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# NEW APPLICATIONS OF CONSUMER PROTECTION LAW: JUDICIAL ACTIVISM OR LEGISLATIVE DIRECTIVE?

J.R. Franke\*  
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## I. INTRODUCTION

State unfair and deceptive trade practices statutes, designed to protect consumers from unfair trade practices, were adopted by the states in the 1960s and 1970s, during the heyday of consumerism.<sup>1</sup> During their early years, these statutes typically were used in ordinary consumer complaint cases, such as misrepresentations in advertising. During recent years, however, these statutes have been used creatively, and often times successfully, in ways probably not envisioned by the legislators who adopted them.<sup>2</sup> Recently, for example, a Texas sheriff sued several newspapers for two million dollars for damage to his reputation allegedly arising from news articles linking him to drug trafficking.<sup>3</sup> The cause of action, however, was not grounded in libel; rather, the cause of action was based on a violation of Texas' deceptive trade statute. The complaint al-

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1. See, e.g., Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980). For a general discussion of this topic, see also Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little F.T.C. Acts": Should Federal Standards Control?* 94 DICK. L. REV. 373 (1990); Roger E. Schlechter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the F.T.C.*, IND. L. REV. 571 (1989); John R. Harrison, Jr., *The Deceptive Trade Practices-Consumer Protection Act: The Shield Becomes a Sword*, 17 ST. MARY'S L.J. 879 (1986); Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1 (1985); Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984); Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981).

2. See Wayne E. Green, *Lawyers Give Deceptive-Trade Statutes New Day in Court, Wider Interpretations*, WALL ST. J., Jan. 24, 1990, at B1.

3. *Id.*

leged that the news reports fraudulently and deceptively misled the public into purchasing the newspapers, thereby violating the state's ban against such practices. The sheriff sued to recover the price he paid for the newspapers, plus damages for mental anguish, damage to reputation, and attorney's fees.<sup>4</sup> Whether this creative use of the state's unfair trade practices act will receive a sympathetic treatment in the courts remains to be seen. However, many other types of innovative uses of these statutes have met with success. For example, courts have applied the statutes in the following situations: business opportunity schemes, landlord-tenant relationships, and even personal injury claims.<sup>5</sup> One commentator has suggested that this creative use of the consumer statutes has arisen as a response to a regulatory and legislative void that occurred during the antiregulatory era of the 1980s.<sup>6</sup>

The wave of creative uses of these statutes, of course, has met stiff resistance by business interests which are lobbying to narrow the scope of the statutes.<sup>7</sup> Business interests charge that the statutes are being abused and are being used in ways that go far beyond the intent of the legislatures that adopted them.<sup>8</sup> The courts, businesses suggest, are abusing their authority in broadly interpreting these statutes to cover a wide variety of situations.

Statutes have been described as "messages from the policy-making body of government, legislatures, that translate ideas and ideologies into law. Statutes officially say, in effect: 'Society has a problem. This is how society shall cope with it.'"<sup>9</sup> The difficulty that frequently arises with respect to these "messages" from the legislatures is in interpreting precisely what message was intended. In interpreting statutes, the courts' primary duty is to interpret the words so as to give effect to the legislature's intent in adopting the statute.<sup>10</sup>

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4. *Id.*

5. *See, e.g.,* *People ex rel. Scott v. Cardet Int'l*, 321 N.E.2d 386 (Ill. App. Ct. 1974); *Pope v. Rollins Protective Servs.* 703 F.2d 197 (5th Cir. 1983).

6. *Green, supra* note 2.

7. *Id.*

8. *Id.*

9. LIEF H. CARTER, *REASON IN LAW* 93 (2d ed. 1984); *see also* STEVEN VAGO, *LAW AND SOCIETY* 122 (2d ed. 1988).

10. *See Ebert v. Poston*, 266 U.S. 548, 554 (1925).

Courts may not, however, rewrite statutes or make additions or deletions to them in an effort to improve upon them.<sup>11</sup>

The standard starting point for interpreting statutes is the plain meaning rule, whereby courts are expected to interpret words in statutes by their ordinary, common meaning.<sup>12</sup> However, strict application of the plain meaning rule frequently subverts the legislature's intent in passing the statute.<sup>13</sup> Therefore courts must resort to other devices to interpret the words so as to effect the legislative intent.<sup>14</sup> Common devices courts rely upon to determine legislative intent are legislative history,<sup>15</sup> the historical context in which the statute was passed,<sup>16</sup> and the subject matter dealt with in the statute,<sup>17</sup> including the problems it was designed to address.<sup>18</sup>

Just as problems exist with the plain meaning rule, problems exist with relying on legislative intent in interpreting statutes. One commentator has described legislative intent as "a most slippery and misleading concept" because a legislature cannot intend anything.<sup>19</sup> Rather, only people, here specifically the individual legislators, can intend anything.<sup>20</sup> Ascertaining legislative intent becomes such a slippery task precisely because of the difficulty of determining the motivations of each individual legislator who supported the law. Individual legislators may have had differing motivations for voting for the bill, or differing interpretations as to the precise intent of the statute. Some legislators may have never even read the bill, but cast a favorable vote for it for purely political reasons.<sup>21</sup>

Another difficulty courts face in ascertaining legislative intent is that they are asked to apply statutes, representing the

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11. See, e.g., *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

12. See, e.g., *Albernaz v. United States*, 450 U.S. 333, 336 (1981); *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980).

13. Carter, *supra* note 9, at 97.

14. See *infra* notes 15-18.

15. 447 U.S. at 308; *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

16. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937); *Red Bird v. United States*, 203 U.S. 76, 89 (1906).

17. *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

18. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

19. CARTER, *supra* note 9, at 99.

20. CARTER, *supra* note 9, at 105.

21. CARTER, *supra* note 9, at 116.

general public policy as established by the legislature, to specific factual disputes.<sup>22</sup> It is simply impossible for legislators to predict the precise factual disputes that might arise.<sup>23</sup> Thus, it is frequently impossible for judges to determine the legislature's intent, either from the statute's plain meaning or from the legislative history, with respect to particular factual disputes. Nevertheless, courts are expected to resolve these disputes. This necessity to resolve disputes frequently forces judges to guess what the legislature might have intended for a particular dispute. Hopefully, their guesses will be educated ones based on their analysis using the plain meaning rule, legislative history, and the historical and legislative context of the statute.

This guesswork that is necessarily built into judicial interpretation makes the judiciary vulnerable to such charges of judicial activism as are now being made by the business community regarding unfair trade practices acts. Certainly in recent years judges have applied the unfair trade practices acts to factual situations not envisioned by the legislative bodies that adopted the statutes. The purpose of this article is to investigate this allegation regarding judicial activism in interpreting these statutes. In applying the state unfair trade practices acts to these fringe cases, are the courts exceeding their authority by interpreting the statutes more broadly than envisioned by the legislatures? Or are the courts merely carrying out legislative intent? In addressing this issue, we necessarily must first examine the intent behind the unfair trade practices acts. The fringe cases then will be examined to determine whether they fit within the scope of the legislative intent.

#### *A. Historical Background of the Development of the Government-Business Relationship*

An understanding of the historical background leading to the 1960s heyday of consumerism is crucial in any analysis of the legislative intent of the unfair trade practices statutes. Historians have identified four stages in the development of gov-

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22. CARTER, *supra* note 9, at 114.

23. CARTER, *supra* note 9, at 114.

ernment regulation of business.<sup>24</sup> The development of unfair trade practices legislation parallels these four stages.

The first stage in the government-business relationship, prevailing throughout most of the nineteenth century, was one in which the government's primary role was oriented towards fostering the development of businesses.<sup>25</sup> Adam Smith's laissez-faire philosophy as enunciated in *The Wealth of Nations*, published in 1776, had a powerful influence on the American nineteenth century approach to the government-business relationship.<sup>26</sup> Although government was actively involved in business by way of promoting a favorable environment for business growth, Smith's "invisible hand" did prevail in the narrow sense that governments at all levels attempted not to place impediments on the development of business. The prevalence of *caveat emptor*<sup>27</sup> with respect to the purchase of goods is consistent with the government approach in this stage of focusing on promoting business development.

By the late nineteenth century, with the rise of big businesses, the focus of the government-business relationship began to shift and the second stage of the business-government relationship began to develop. The growth of corporate power attendant to the industrial revolution resulted in the development of two contradictory forces that, ironically, led to increased government involvement in the regulation of business. With the advent of the national market and the rise of large corporations with sufficient power to affect that market, large businesses sought stability through developing cooperative rather than competitive relationships.<sup>28</sup> Because of the difficulties of enforcing such voluntary cooperative arrangements, big businesses increasingly turned to the government to mandate rules and procedures designed to reduce the uncertainties in the business environment.<sup>29</sup> Although businesses gave lip-service to the principle of laissez-faire when it suited their

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24. See generally MANSEL G. BLACKFORD & K. AUSTIN KERR, BUSINESS ENTERPRISE IN AMERICAN HISTORY 12-17 (1986) (describing these stages). "Government" includes local, state, and federal governments. *Id.*

25. *Id.* at 81-149 (discussing this developmental stage).

26. *Id.* at 64.

27. "Let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1985).

28. BLACKFORD & KERR, *supra* note 24, at 185, and at 151-264 (discussing this developmental stage).

29. BLACKFORD & KERR, *supra* note 24, at 197.

interests, they were strong proponents of government intervention when that served their interests.<sup>30</sup> At the same time business began supporting government regulation, protest movements, concerned that the increasing power of big business was a threat to democracy, arose clamoring for increasing government involvement in regulating the activities of business.<sup>31</sup> The 1890 Sherman Anti-Trust Act represented the protest movements of this time in two respects. First, the theory behind the Sherman Anti-Trust Act was that it would maintain competition in the market place, and thus protect equality of economic opportunity and ultimately democracy and the American character.<sup>32</sup> Second, the Sherman Anti-Trust Act epitomized the protest movements of this time in that it was totally ineffectual in accomplishing its stated goals. Thus, by the end of the nineteenth century, although the dialogue regarding the government's role in regulating business had begun to change, the focus remained the same as it had been throughout the nineteenth century—on creating an environment in which business could flourish.<sup>33</sup>

However, the late nineteenth century dialogue regarding government regulation of business did set the stage for the early twentieth century Progressive movement which saw the emergence of serious government involvement in regulation of the economy.<sup>34</sup> The Progressive Movement, which lasted from the turn of the century to the first World War, was supported by both the business community and by the social movements protesting the unchecked power of big business. The creation of the Federal Trade Commission (FTC) in 1914 reflects the convergence of interests among big business and the protest movements that occurred during the Progressive Era. Big businesses supported the FTC because it created a national policy on trusts, desirable both because such a national policy provided a uniformity impossible if such matters were dealt with on the local level, and because through business involvement in national governmental affairs, business could have a hand in

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30. BLACKFORD & KERR, *supra* note 24, at 199.

31. BLACKFORD & KERR, *supra* note 24, at 197.

32. BLACKFORD & KERR, *supra* note 24, at 223.

33. BLACKFORD & KERR, *supra* note 24, at 224.

34. See BLACKFORD & KERR, *supra* note 24, at 226-64 (discussing this stage in the government-business relationship).

shaping national policy. The protest movements supported the FTC as a means by which the government could limit monopolistic practices that the protestors viewed as threatening the very fabric of American democracy.<sup>35</sup> One theme of the Progressive Era, then, was that big businesses supported government regulation to the extent that such regulation contributed to the "control of the uncertainties and instabilities of unbridled price competition by the use of systematic, rational management systems."<sup>36</sup> Another theme of the Progressive Era was the desire to involve the government in business affairs so as to "limit the size of business firms and insure that price competition governed business behavior."<sup>37</sup> Because both big business and protestors viewed unchecked price competition as an evil, it is clear that many had lost confidence in the ability of the "invisible hand" to reign supreme. The story of the twentieth century government-business relationship is one of attempting to achieve the benefits of the invisible hand through government regulation.

One of the crucial issues debated throughout the Progressive period was how this government regulation was to be effectuated. Two views dominated the discussions.<sup>38</sup> The first, advocated by Theodore Roosevelt and his New Nationalists and described as the "statist" view, would have the federal government serve as the director of the economy. In the statist view corporations would be considered "public utilities and agents of public policy,"<sup>39</sup> hence subject to government direction and planning efforts. This view, involving intimate, direct government regulation of corporations, "wished to combine public control and planning with the advantages of private ownership."<sup>40</sup> The statist view, then, focused on public regulation of business. The second view, advocated by William Howard Taft and Woodrow Wilson and described as the "nonstatist" view, would involve the government only indirectly

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35. For a discussion of the FTC, see BLACKFORD & KERR, *supra* note 24, at 249.

36. BLACKFORD & KERR, *supra* note 24, at 233.

37. BLACKFORD & KERR, *supra* note 24, at 234.

38. For a discussion of and supporting material on these two views, see MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 324 (1988).

39. *Id.*

40. *Id.*



in regulating businesses. Instead of being directly involved in business decisions and planning, the government's role would be a monitoring one, limited to providing remedies for and taking actions to prevent unfair business practices including unreasonable restraints of trade.<sup>41</sup> The nonstatist view focusing on private regulation of business prevailed during the Progressive Era and established the pattern for twentieth century government regulation of business.<sup>42</sup>

The third stage in the development of the government-business relationship began in the 1930s as a response to the Great Depression.<sup>43</sup> After World War I the focus of American business shifted "from a producer-dominated to a consumer-oriented society."<sup>44</sup> Consistent with this consumer-oriented society, persuasive advertising came to be used extensively.<sup>45</sup> The Great Depression occurred in the midst of this consumer explosion. The result, in terms of the government-business relationship, was that the government came to be viewed as the vehicle for guaranteeing economic security both for business and individuals.<sup>46</sup> New regulations, such as those in the securities and banking industries, attempted to achieve some centralized control over economic forces, while laws establishing the Social Security system and unemployment compensation attempted to guarantee some minimal level of economic security for individuals.<sup>47</sup>

The fourth stage in the government-business relationship began after World War II.<sup>48</sup> The thrust toward a consumer society, begun after World War I, accelerated with great rapidity in the 1950s and 1960s. The identifying characteristics of the economy were growth and prosperity.<sup>49</sup> Our "affluent society" was the envy of the world. This post-war prosperity led to this fourth stage in the government-business relationship, that of "the new regulation."<sup>50</sup> Business historians describe

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41. *Id.*

42. *Id.*

43. BLACKFORD & KERR, *supra* note 24, at 313-38 (describing this stage).

44. *Id.* at 267.

45. *Id.* at 274.

46. *See generally id.*

47. *See generally id.*

48. *Id.* at 340-424 (describing this stage).

49. *Id.* at 341.

50. *Id.* at 406.

the "new regulation" of the 1960s, as a "product of the success of the American business system" wherein the post-war prosperity and "unprecedented material abundance" led Americans to assume "as their birthright a good life of material plenty, comfort, safety, and security."<sup>51</sup> In this stage of the government-business relationship, the focus of regulation became quality-of-life issues. Civil rights laws, environmental protection laws, and work safety laws epitomized the new focus of the affluent society.<sup>52</sup>

### B. *Historical Background of Unfair Trade Practices Legislation*

The development of unfair trade practices law parallels the development of the stages in the government-business relationship. In the nineteenth century the only remedy available to consumers misled by unfair or deceptive practices was common law fraud or deceit, which, because they presented difficult proof problems for consumers, were not effective deterrents to such practices.<sup>53</sup> Thus, *caveat emptor* truly reigned supreme in the late nineteenth century. The groundwork for unfair trade practices was laid during the second stage in the government-business relationship during which the FTC was created. At the time of its creation in 1914, the FTC was established not as a consumer protection agency, but rather to protect businesses from unfair methods of competition.<sup>54</sup> This initial goal of the FTC, then, was consistent with the second stage in the government-business relationship wherein business interests sought to use government regulation to reduce uncertainties in the business environment. This initial goal also was consistent with one Progressive Era theme, that unchecked price competition was an evil destined to destroy American society.

In 1938, in the midst of the third stage in the government-business relationship, Congress amended the Federal Trade Commission Act and gave the FTC authority to regulate "unfair or deceptive acts or practices in or affecting commerce."<sup>55</sup> The intent of the 1938 amendment was to pro-

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51. *Id.*

52. *Id.* at 408.

53. Harrison, *supra* note 1, at 883.

54. Leaffer and Lipson, *supra* note 1, at 524; Karns, *supra* note 1, at 2.

55. Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15

vide to consumers the same protection from methods of unfair competition that business received from the 1914 Act.<sup>56</sup> The thrust of this amendment, then, was consistent with the third stage in the government-business relationship in that it addressed the needs of the consumer-oriented society.<sup>57</sup>

The heyday of consumerism occurred in the 1960s, in the midst of the fourth stage of the government-business relationship wherein the focus of regulation was on quality-of-life issues. By this time, with extensive use of persuasive advertising and with technologically complex products, a widespread belief arose that the workings of the market did not necessarily protect consumer interests and that it was increasingly difficult for consumers to have access to the kinds of information that would enable them to protect their own interests.<sup>58</sup> Thus, as the marketplace changed from the personal, primarily local market of the nineteenth century, to the impersonal, international marketplace of the 1960s, consumers were forced to look to government regulation to protect their interests.<sup>59</sup>

Prior to the 1960s consumer movement, the FTC employed few of its resources towards consumer protection.<sup>60</sup> However, accompanying the rise of the consumer movement in the 1960s was the publication of studies presenting serious criticisms of the FTC.<sup>61</sup> Consequently, the FTC began devoting serious attention to fulfilling its role of protecting consumers. The FTC's focus broadened beyond its traditional concern with deceptive advertising and began encompassing unfair consumer practices such as fraudulent business opportunity schemes, abuses arising from door-to-door sales, unfair debt collection practices, and unconscionability.<sup>62</sup> Congress also became much more consumer-oriented during this time peri-

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U.S.C. § 45).

56. 83 CONG. REC. 3,256 (1938) (statement of amendment co-sponsor Senator Wheeler).

57. BLACKFORD & KERR, *supra* note 42, at 313-38.

58. BLACKFORD & KERR, *supra* note 24, at 412.

59. See William Webster, *Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act*, 52 MO. L. REV. 365, 365 (1987).

60. Leaffer & Lipson, *supra* note 1, at 526.

61. Leaffer & Lipson, *supra* note 1, 526 n.32.

62. Leaffer & Lipson, *supra* note 1, at 527. One commentator asserts that between 1964 and 1972 the FTC's focus underwent a transition "away from the original concept of deception and toward the articulation of a substantive law of unfairness." Averitt, *supra* note 1, at 240.

od, passing numerous statutes designed to protect consumers against unfair practices.<sup>63</sup> Many of these federal statutes strengthened the enforcement and regulatory authority of the FTC.<sup>64</sup>

Amidst this wave of consumerism, the FTC also expressly began encouraging the states to become active participants in effectuating consumer protection activities. During the 1960s and 1970s most states, at the FTC's urging, adopted statutes designed to curb unfair or deceptive acts or practices.<sup>65</sup> The FTC and the commissioners on Uniform State Laws drafted various forms of model state statutes and strongly encouraged the states to adopt one of the forms.<sup>66</sup> The FTC's motivation was one of practicality—the widespread existence of consumer abuse at the local level precluded any effective enforcement by federal authorities, a task which could only be accomplished on the state and local level.<sup>67</sup>

Most state statutes, although patterned after the FTC Act, differ significantly from the federal statutes in that the state statutes provide private remedies, including in many cases treble damages and attorney's fees, thereby encouraging individual consumer actions. Private remedies were included at the state level at the urging of the FTC. Such remedies were viewed as a way of avoiding direct government regulation, and instead allowing for private regulation by way of individual consumer actions.<sup>68</sup> The state statutes also generally include a provision whereby state authorities are directed to look at the federal act for guidance in defining unfair or deceptive acts or practices. The federal and state laws, then, were intended to complement each other: the federal authorities would provide the substantive guidelines while state authorities would provide enforcement and remedies.<sup>69</sup>

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63. Leaffer & Lipson, *supra* note 1, at 528.

64. Leaffer & Lipson, *supra* note 1, at 528.

65. Leaffer & Lipson, *supra* note 1, at 521.

66. Leaffer & Lipson, *supra* note 1, at 521. The FTC recommended versions have been adopted in twenty-six states, while one of the Uniform Commissioners versions was adopted in fourteen states. Dunbar, *supra* note 1, at 428.

67. Leaffer & Lipson, *supra* note 1, at 522.

68. Averitt, *supra* note 1, at 228, 239, 281-82.

69. Albert L. Norton, *The South Carolina Unfair Trade Practices Act and the Void-For-Vagueness Doctrine*, 40 S.C. L. REV. 641, 641 (1989).

The intent behind the flurry of consumer activity of the 1960s and 1970s at both the federal and state levels was essentially the same: to safeguard the workings of the market system. Classical economic theory mandates that, in order for the invisible hand of the free market economy to work, consumers must at all times make rational choices. The ability to make rational choices requires the consumer to have access to perfect information. To the extent that businesses engage in deceptive or unfair acts or practices, they interfere with consumer access to perfect information, thereby interfering with the operations of the market.<sup>70</sup> The intent behind these state deceptive trade practices statutes, then, was consistent with all four stages of the government-business relationship—preservation, through government regulations if necessary, of the market system.

### C. *The Statutory Interpretation Issue*

The statutory interpretation issue that arises with respect to the state unfair trade practices statutes is whether the courts' application of these statutes to fringe cases is consistent with this legislative intent; that is, how far did the legislatures expect the courts to go in interpreting and applying the statutes so as to protect the operations of the market system? This article examines a series of fringe cases, and the statutes under which they arose, to determine whether they were interpreted consistently with this intent.

In order to make this task surmountable, the analysis is limited to the statutes and case law of seven states which have been among the most active in applying consumer protection law to "fringe" cases: Connecticut, Illinois, Massachusetts, New Jersey, North Carolina, Pennsylvania and Texas.<sup>71</sup> While most

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70. Averitt, *supra* note 1, at 227-39; John Morgan, *The Connecticut Unfair Trade Practices Act: Determining Standards of Conduct*, 62 CONN. B.J. 74, 78 (1988); Larry Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 815 (1987).

71. See CONN. GEN. STAT. § 42-110a to 110q (Supp. 1991); Consumer Fraud and Deceptive Business Practices Act, ILL. REV. STAT. ch. 121 1/2, paras. 261-72 (Supp. 1991); Uniform Deceptive Trade Practices Act, ILL. REV. STAT. ch. 121 1/2, paras. 311-17 (Supp. 1991); MASS. ANN. LAWS ch. 93A, §§ 1-11 (Law. Co-op 1985 & Supp. 1991); Consumer Fraud Act, 1960 N.J. Laws ch. 39, p. 137 §§ 1-12 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-48 (Supp. 1991)); N.C. GEN. STAT. §§ 75-1.1 to 75-35 (1991); Unfair Trade Practices and Consumer Protections Law, 1968 Pa. Laws 1224, No. 387 §§ 1-9 (codified as amended at PA. STAT. ANN.

of these states have consumer protection legislation patterned after the first alternative version of the Model Unfair Trade Practices and Consumer Protection Law,<sup>72</sup> Illinois also has adopted a version of the Uniform Deceptive Trade Practices Act,<sup>73</sup> Pennsylvania follows the third alternative version of the model Unfair Trade Practices and Consumer Protection Law,<sup>74</sup> and Texas, at least in its original legislation, followed the second alternative version of that same model legislation.<sup>75</sup> New Jersey has legislation characterized as a Consumer Fraud Act, not modeled on the above-described legislation.<sup>76</sup>

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tit. 73, §§ 201-1 to 201-9 (Supp. 1991)); TEX. BUS. & COM. CODE ANN. §§ 17.41 to 17.63 (Supp. 1991). The focus of discussion of these states' laws will be regarding the consumer protection aspects of coverage, as contrasted with the business/competitor protection aspects of coverage.

72. The Federal Trade Commission acting jointly with the Committee on Suggested State Legislation of the Council of State Governments proposed three alternative versions of an Unfair Trade Practices and Consumer Protection Law for adoption by the states. COMMITTEE ON SUGGESTED LEGISLATION, COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION: UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW - REVISION, 141-52 (1970).

Alternative Form No. 1 is patterned directly after the Federal Trade Commission act and prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* at 146. Alternative Form No. 2 enjoins "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." *Id.*

Alternative Form No. 3 prohibits twelve specific types of deceptive practices (carried over from the Uniform Deceptive Trade Practices Act, described below) and additionally "any other conduct which similarly creates a likelihood of confusion or of misunderstanding" or "any act or practice which is unfair or deceptive to the consumer." *Id.* at 146-47.

Connecticut, Illinois, Massachusetts and North Carolina all have statutes modeled on Alternative Form No. 1 of this suggested legislation. *See* CONN. GEN. STAT. §§ 42-110a to 110q (Supp. 1991); ILL. REV. STAT. ch. 121 1/2, paras. 261-72 (Supp. 1991); MASS. ANN. LAWS ch. 93A §§ 1-11 (Law. Co-op 1985 & Supp. 1991); N.C. GEN. STAT. §§ 75-1.1 to 75-35 (1991).

73. ILL. REV. STAT. Ch. 121 1/2, paras. 311-17 (Supp. 1991).

The National Conference of Commissioners on Uniform State Laws proposed a Uniform Deceptive Trade Practices Act in 1964 (rev. 1966). 7A U.L.A. 299 (1964 Act) and 265 (1966 Rev.) (1985). That model legislation defines eleven specific deceptive trade practices along with a catch-all provision prohibiting "any other conduct which similarly creates a likelihood of confusion or misunderstanding," and provides for injunctive relief for "[a] person likely to be damaged by a deceptive trade practice of another." *Id.*

74. PA. STAT. ANN. tit. 73, §§ 201-1 to 201-9 (Supp. 1991). *See supra* note 77.

75. TEX. BUS. & COM. CODE ANN. §§ 17.41 to 17.63. (West 1987 & Supp. 1991) *See supra* note 77.

76. N.J. REV. STAT. §§ 56:8-1 to 56:8-48 (Supp. 1990). That legislation prohibits any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or intentional concealment of a material fact in con-

Despite the variations in model consumer protection legislation, there does not seem to be a strong correlation between the "model" followed and the expansiveness of interpretation and application of the law by the courts.<sup>77</sup> It is also important to note that many of these statutes varied somewhat from the models when adopted, and that all have been amended in significant ways since their original enactment.<sup>78</sup>

The "fringe" cases examined are those which have expanded the traditional concepts of who is to be protected by this legislation, the types of transactions covered by the legislation and, to some extent, the potential defendants to whom the legislation will apply. Such broad interpretations of which persons are entitled to consumer protection and what constitutes both trade and commerce, and broad approaches to the cumulation of consumer protection remedies to those available under more specialized regulatory statutes or common law have allowed for application of these laws in many new contexts. Cases have arisen with respect to commercial or investment transactions,<sup>79</sup> credit and debt practices,<sup>80</sup> insurance practices,<sup>81</sup> banking practices,<sup>82</sup> sales of securities and commodities futures,<sup>83</sup> residential rental situations,<sup>84</sup> and even some personal injury claims.<sup>85</sup>

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nection with the advertisement or sale of any merchandise or real estate. *Id.* § 56:8-2.

77. See Dunbar, *supra* note 1, at 429; Leaffer & Lipson, *supra* note 1, at 532.

Note that there is also a Uniform Consumer Sales Practices Act, developed by the National Conference of Commissioners on Uniform State Laws, which applies to "consumer transactions" and prohibits deceptive acts or practices, including specific enumerated practices and unconscionable acts or practices. 7A U.L.A. 231 (1985).

Despite the differences in names of model legislation, reference to this genre of legislation will be as consumer protection legislation or unfair trade practices legislation.

78. See *supra* note 71.

79. See, e.g., Bailey Employment Sys. v. Hahn, 545 F. Supp. 62 (D. Conn. 1982); Morgan v. Air Brook Limousine, 510 A.2d 1197 (N.J. Super. Ct. 1986).

80. See, e.g., Garland v. Mobil Oil Corp., 340 F. Supp. 1095 (N.D. Ill. 1972); Pennsylvania Retailers' Ass'n v. Lazin, 426 A.2d 712 (Pa. Commw. Ct. 1981).

81. See, e.g., Dodd v. Commercial Union Ins. Co., 365 N.E.2d 802 (Mass. 1977).

82. See, e.g., Raymer v. Bay State Nat'l Bank, 424 N.E.2d 515 (Mass. 1981).

83. See, e.g., Natrass v. Rosenthal & Co., 641 S.W.2d 675 (Tex. App. Ct. 1982).

84. See, e.g., Love v. Pressley, 239 S.E.2d 574 (N.C. App. 1977); 49 Prospect Street Tenants Ass'n v. Sheva Gardens, Inc., 547 A.2d 1134 (N.J. Super. Ct. 1988).

85. See, e.g., Jones v. Sportelli, 399 A.2d 1047 (N.J. Super. Ct. 1979) (allowing

In determining whether these broad interpretations of statutory coverage are indeed judicial expansions of the legislation or are applications consistent with legislative intent, the statutes themselves must be examined, especially legislative responses to developing jurisprudence in the form of subsequent amendments and with respect to available legislative history. Also instructive is any commentary available relating to the appropriate model of the state's consumer protection legislation. Finally, it is necessary to compare the Federal Trade Commission Act<sup>86</sup> (FTC Act), its legislative history and its interpretation and application by the Federal Trade Commission (FTC) and federal courts, since many of the state acts specifically direct that courts interpreting them are guided by federal treatment of the FTC Act.<sup>87</sup> Even absent a specific statutory directive, state courts frequently are guided by FTC Act jurisprudence because of the similarity between the state and federal legislation, and because of the vast source of expert interpretive authority under the federal law.<sup>88</sup>

Moving in reverse order, from the more general source of guidance, the FTC Act jurisprudence, to the specific source of instruction, the state legislation and legislative direction, there is a caveat with regard to comparison of these state and federal laws arising from their differing enforcement mechanisms. The federal act does not provide a private right of action,<sup>89</sup> whereas the state statutes specifically allow for such private enforcement.<sup>90</sup> Inherent in this difference among enforcement

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recovery for medical expenses, but not pain and suffering or loss of consortium, regarding injuries suffered from use of intrauterine device).

86. 15 U.S.C. §§ 41-77 (1976).

87. See CONN. GEN. STAT. § 42-110b(b), (c) (Supp. 1990); ILL. REV. STAT. ch. 121 1/2, para. 262 (Supp. 1990); MASS. ANN. LAWS ch. 93A, § 2(b), (c) (Law. Co-op 1985 & Supp. 1990); TEX. BUS. & COM. CODE ANN. § 17.46(c)(1) (Supp. 1991).

88. Leaffer & Lipson, *supra* note 1, at 533-34 & n.83 (citing, *inter alia*, Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 817-18 (Pa. 1974)).

89. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998-1002 (D.C. Cir. 1973).

90. See generally FEDERAL TRADE COMMISSION, FACT SHEET: STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES (1982), cited in Raymer v. Bay State Nat'l Bank, 424 N.E.2d 515, app. (Mass. 1981); see also CONN. GEN. STAT. § 42-110g (Supp. 1990); ILL. REV. STAT. ch. 121 1/2, para. 270a (Supp. 1990); MASS. ANN. LAWS ch. 93A, §§ 9, 11 (Law. Co-op 1985 & Supp. 1990); Consumer Fraud Act, 1971 N.J. LAWS ch. 247, § 7 (codified at N.J. REV. STAT. § 56:8-19 (1989)); N.C. GEN. STAT. § 75-16 (1990); Act of Dec. 17, 1976, Pa. Laws 1166, No. 260 § 1 (as affected 1978 Pa. Laws 202, No. 53, § 2(a)[1433])(codified as amended at Pa.



mechanisms is a difference in the expected reach of the legislative schemes. The federal act contemplates that it will reach only acts or practices impacting on the public interest or evidencing some pattern of misconduct having a widespread effect on consumers.<sup>91</sup> By contrast, the state laws tend not to limit their reach to conduct affecting a public injury, and in several cases the statutes specifically declare that no showing of such public injury is necessary to obtain private relief.<sup>92</sup> Thus, it is expected that private enforcement under the state legislation will spearhead the continuing development of consumer protections.<sup>93</sup> Nonetheless, examination of the legislative history of the FTC Act and interpretations and applications of that Act provide some instruction about the minimum intended reach of state consumer protection legislation.

## II. THE FTC ACT

The original FTC Act, enacted in 1914, prohibited unfair methods of competition.<sup>94</sup> The language was drafted to eschew any attempt to define specific prohibited practices in recognition of the need for flexibility and experience in identifying those anticompetitive devices that contravened the spirit

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STAT. ANN. tit. 73, § 201-9.2 (1971 & Supp. 1991)); TEX. BUS. & COM. CODE ANN. § 17.50 (Supp. 1991).

91. See 15 U.S.C. § 45(b) (1976) (limiting FTC jurisdiction to proceedings "to the interest of the public"); FTC v. Klesner, 280 U.S. 19, 27-28 (1929); Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in *In re International Harvester Co.*, 104 F.T.C. 949, pg app. pg (1984); Averitt, *supra* note 1, at 225; Leaffer & Lipson, *supra* note 1, at 524-25.

92. Most of these statutes grant a private cause of action to any person who suffers damage/injury/loss separate from, and in addition to, the enforcement powers of a public official, usually the attorney general, who is to proceed in matters affecting the public interest. See CONN. GEN. STAT. § 42-110g(a) (1987); ILL. REV. STAT. ch. 121 1/2, 270a (Supp. 1990); N.C. GEN. STAT. § 75-16 (1990); PA. STAT. ANN. tit. 73, § 201-9.2 (Supp. 1990-91) (private action limited to any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property); TEX. BUS. & COM. CODE ANN. § 17.50 (Supp. 1991) (Provides relief for consumers. "Consumer" is defined to include businesses that have assets of less than \$25 million. *Id.* § 17.45(4)). See generally, COMMITTEE ON SUGGESTED LEGISLATION, *supra* note 72, at 142-44. Connecticut and Illinois statutes specifically provide that proof of public interest or injury is not required to state a cause of action. See CONN. GEN. STAT. § 42-110g(a) (1987); ILL. REV. STAT. ch. 121 1/2, para. 270a (Supp. 1990).

93. Leaffer & Lipson, *supra* note 1, at 530-31.

94. Ch. 311, 38 Stat. 717 (1914) (see specifically § 5).

of the law.<sup>95</sup> Although there were clear indications that Congress intended unfair consumer practices to be subsumed within the concept of unfair competition,<sup>96</sup> the Supreme Court in *FTC v. Ralendram*<sup>97</sup> adopted a more limiting construction of the language and announced that any consumer protection jurisdiction of the FTC must derive from a showing of related competitive injury.<sup>98</sup> Congress responded in 1938 with the Wheeler-Lea Amendment which added to the language of Section 5 a prohibition of "unfair or deceptive acts or practices."<sup>99</sup> The announced purpose of the amendment was to overcome the limitation on jurisdiction imposed by the Supreme Court in the *Ralendram* decision, and to make the consumer injured by unfair trade practices of equal concern, under the law, with injured businesses.<sup>100</sup> The amendment was universally viewed as largely procedural, and not as a change in the underlying substantive powers of the FTC.<sup>101</sup>

Application of this FTC consumer unfairness jurisdiction was limited until the 1960s and 1970s when the agency, in response to sharp criticisms of its inaction in the consumer arena, became much more aggressive in its consumer protection enforcement activities.<sup>102</sup> Thereafter, the FTC successfully challenged a widespread variety of practices impacting on consumers, including several business opportunity schemes,<sup>103</sup> unfair credit and debt collection practices,<sup>104</sup> and failure to disclose potential safety problems with regard to dangerous products.<sup>105</sup> The Act also has been generally interpreted to be coextensive with other regulatory legislation, and the FTC's jurisdiction has been found not preempted by, *inter*

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95. Leaffer & Lipson, *supra* note 1, at 524;

Neil W. Averitt & Terry Calvani, *The Role of the FTC in American Society*, 39 OKLA. L. REV. 39, 40 (1986); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 990 (D.C. Cir. 1973).

96. Averitt, *supra* note 1, at 230-31.

97. 283 U.S. 643 (1931).

98. *Id.*

99. Ch. 49, 52 Stat. 111 (1938).

100. See 83 CONG. REC. 3255-56 (1938) (remarks of Senator Wheeler), and 83 CONG. REC. 391-92 (1938) (remarks of Representative Lea).

101. Averitt, *supra* note 1, at 234-35.

102. Leaffer & Lipson, *supra* note 1, at 526-29.

103. Leaffer & Lipson, *supra* note 1, at 527.

104. Leaffer & Lipson, *supra* note 1, at 528-29.

105. Averitt, *supra* note 1, at 240.

alia, the existence of FDA authority,<sup>106</sup> the Interstate Land Sales Full Disclosure Act,<sup>107</sup> the Internal Revenue Code,<sup>108</sup> or the McCarran-Ferguson Act.<sup>109</sup>

The FTC itself announced a detailed interpretation of the scope of its consumer unfairness jurisdiction in 1980.<sup>110</sup> That interpretation centered upon two factors evolved from earlier FTC cases and cited with approval by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*:<sup>111</sup> whether the conduct threatens substantial consumer injury, or violates an established public policy.<sup>112</sup> To find conduct threatening consumer injury legally "unfair," the injury must be substantial and not reasonably avoidable, and the conduct must be unjustified by countervailing benefits to consumers or competition.<sup>113</sup> The threat of injury usually contemplates monetary harm, but may also derive from health and safety risks, and in the extreme case, even from emotional harm.<sup>114</sup> The threat of injury is deemed not reasonably avoidable where the act or practice effectively deprives consumers of the ability to make an independent decision in the marketplace, either by overt coercion or by withholding necessary information about a good or service.<sup>115</sup>

The inquiry as to whether conduct violates an established public policy has been used mainly to bolster a finding of unfairness based upon other evidence of consumer injury, though it has in some cases served as the sole basis for a finding of

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106. *Warner-Lambert Co. v. FTC*, 361 F. Supp. 948 (D.D.C. 1973).

107. *AMREP Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985).

108. *Beneficial Corp. v. FTC*, 542 F.2d 611 (3rd Cir. 1976).

109. *FTC v. Manufacturers Hanover Consumer Servs.*, 567 F. Supp. 992 (D. Pa. 1983).

110. Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in *In re International Harvester Co.*, 104 F.T.C. 949 (1984); see also Averitt, *supra* note 1.

111. 405 U.S. 233 (1972).

112. *International Harvester*, 104 F.T.C. at 1072-76; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972). A third factor cited earlier by the Commission, and again in the *Sperry & Hutchinson* case, whether the conduct is immoral, unethical, oppressive, or unscrupulous, was later determined to be duplicative of the other two, and so not an independent basis for a finding of consumer unfairness. *International Harvester* at 1076.

113. *Id.* at 1073.

114. *Id.*

115. *Id.* at 1074.

consumer injury.<sup>116</sup> Decisions based on this factor have encompassed First Amendment considerations involving consumers' rights to access to information, due process considerations involved in unreasonable collection efforts, and, in another vein, the FTC's discretionary decisions to refrain from enforcement efforts where other bodies may act.<sup>117</sup>

The underlying policy of the FTC's consumer unfairness jurisdiction has been preservation of consumer sovereignty.<sup>118</sup> Intervention is appropriate only where the act or practice challenged is perceived to interfere with self-correction of the market via consumers' ability to select and support satisfactory products and avoid inadequate alternatives.<sup>119</sup>

The same policy has defined the development of the deception standard applied by the FTC, the goal there being to ensure that consumer choice will not be distorted by misleading information.<sup>120</sup> The longstanding standard applied by the FTC and federal courts had been that a practice was deceptive if it had the tendency or capacity to materially mislead a substantial number of consumers.<sup>121</sup> That standard did not require a showing of intent to mislead or that consumers were actually misled, and left a wide degree of latitude in evaluating the potential impact of the conduct on a particularly credulous segment of the population.<sup>122</sup> In 1983, the FTC announced a new deception standard, labeling a practice deceptive if it is likely to mislead consumers, acting reasonably under the circumstances, to their detriment.<sup>123</sup> This new standard appears

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116. *Id.* at 1075.

117. *Id.* at 1075-76.

118. Averitt, *supra* note 1, at 227.

119. Averitt, *supra* note 1, at 251.

120. Mathew J. Lefevre, *Understanding the Connecticut Unfair Trade Practices Act: Analysis of Federal Precedent and Connecticut Case Law*, 9 U. BRIDGEPORT L. REV. 325, 340 (1988) (citing the Companion Statement to the FTC Policy Statement on Consumer Unfairness, reprinted in [1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 55,951-55). The "deceptive practices" jurisdiction of the FTC is generally considered to constitute a subsection of the more general "unfair practices" jurisdiction. Averitt, *supra* note 1, at 265.

121. Lefevre, *supra* note 120, at 335.

122. Lefevre, *supra* note 120, at 335-37.

123. Lefevre, *supra* note 120, at 338 (citing Letter from James C. Miller, III, Chairman, FTC to John D. Dingell, Chairman, House Comm. on Energy and Commerce (Oct. 14, 1983), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 50,455 at 56,071-72, and in *In re Cliffdale Assoc.*, 103 F.T.C. 110 pg app. pg (1984)).

to impose more stringent requirements for a finding of deception, though the real impact of the change is, as yet, unclear.<sup>124</sup> The National Association of Attorneys General adopted a resolution opposing the reformulation of the deception standard,<sup>125</sup> and the FTC announced that it did not consider its proposed interpretation binding on those states directed by their statutes to look to the FTC Act jurisprudence.<sup>126</sup>

### III. STATE CONSUMER PROTECTION LEGISLATION

Little additional interpretive guidance is afforded by the commentary accompanying the models of state unfair trade practices or consumer protection legislation. According to the Committee on Suggested State Legislation, the first alternative version of the Model Unfair Trade Practices and Consumer Protection Law was intended to be coextensive with Section 5 of the FTC Act, reaching both practices affecting consumers and practices affecting competitors.<sup>127</sup> Alternative version two, which eliminated the reference to unfair competition, was meant to focus on the consumer arena for states that already had legislation in place designed to protect competitors.<sup>128</sup> The third alternative version, with its list of specific prohibitions, was perceived to be somewhat narrower in scope than the other two versions, despite the addition of the catch-all subsection prohibiting other unfair or deceptive acts.<sup>129</sup>

The Uniform Deceptive Trade Practices Act does not speak specifically to a goal of protection of consumers or competitors, but has an announced purpose of removing undue

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124. Lefevre, *supra* note 120, at 339-40.

125. Lefevre, *supra* note 120, at 339 (citing Sullivan & Marks, *The FTC's Deceptive Advertising Policy: A Legal and Economic Analysis*, 64 OR. L. REV. 593, 605-06 n.69 (1986) (citing 46 Antitrust Trade Reg. Rep. (BNA) No. 641, (March 29, 1984))).

126. Lefevre, *supra* note 120, at 339-340 (citing Jack E. Karns, *Redefining "Deceptive" Advertising Under the Illinois Consumer Fraud and Deceptive Business Practices Act After Cliffdale Associates*, 1985 S. ILL. U. L.J. 1, 59 n.409 (quoting *FTC's Authority Over Deceptive Advertising: Hearings Before Subcomm. of the Comm. on Commerce, Science and Transportation*, 97th Cong., 2nd Sess. 21-22 (1982))).

127. COMMITTEE ON SUGGESTED LEGISLATION, CONG., SESS., COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION: UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW-REVISION 141, 142 (1970).

128. *Id.*

129. *Id.*

restrictions on common law tort actions relating to unfair trade practices.<sup>130</sup> The general foci of its listed prohibitions are on misleading trade identifications and on false or misleading advertisement, though it was intended that the courts would largely define the bounds of the Act on a case-by-case basis.<sup>131</sup>

Against this backdrop of general interpretive guidance, particular state statutes, accompanying legislative history and subsequent legislative action must be examined for more direct evidence of legislative intent. Then the developing "fringe" case law can be reviewed to make a determination as to whether that jurisprudence comports with legislative intent.

#### A. *Connecticut*

The Connecticut Unfair Trade Practices Act was enacted in 1973.<sup>132</sup> Its basic proscription mimics the FTC Act, forbidding "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."<sup>133</sup> As originally enacted, the unfair or deceptive acts or practices prohibited were those "determined to be" unfair or deceptive by the FTC or federal courts.<sup>134</sup> "Trade" and "commerce" were defined to include the advertising, sale, offering for sale, or distribution of services, property, articles, commodities or things of value.<sup>135</sup> The Act gave authority to the Commissioner of the Connecticut Department of Consum-

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130. 7A U.L.A. 299 (1964), *revised by* 7A U.L.A. 266 (1966).

131. *Id.* at 300.

132. Act of Jun. 15, 1973, 73-615, 1973 Conn. Acts 1387 (Reg. Sess.) (codified as amended at CONN. GEN. STAT.. §§ 42-110a to 110q (1987)). This law repealed all of the Uniform Deceptive Trade Practices Act (CONN. GEN. STAT.. §§ 42-115c to 42-115f) except § 3 (CONN. GEN. STAT.. § 42-115e), which remains in effect. See 7A U.L.A. 299, 302 (1964).

133. See *supra* note 72; compare CONN. GEN. STAT.. § 42-110b (1987), with the FTC Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (1988).

134. Act of Jun. 15, 1973, 73-615 § 2(a), 1973 Conn. Acts, 1387 (Reg. Sess.) This language was originally codified at CONN. GEN. STAT.. § 42-110b(a), but was subsequently deleted by An Act Concerning Deceptive Trade Practices, 1976 Conn. Acts 76-303 § 1 (Reg. Sess.). See *infra* note 140 and accompanying text. See also Robert M. Langer & David E. Ormstedt, *The Connecticut Unfair Trade Practices Act*, 54 CONN. BAR J. 388, 389 (1980).

135. Act of Jun. 15, 1973, 73-615 § 1(4), 1973 Conn. Acts 1387 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110a(4) (1987)).

er Protection to adopt interpretive regulations defining prohibited acts or practices that were not inconsistent with FTC Act jurisprudence.<sup>136</sup> The 1973 act also granted a private right of action to "any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers . . . loss . . . as the result of . . . a method act or practice prohibited by section 42-110b [providing for regulation by the Commissioner]."<sup>137</sup> Specifically exempted from coverage were, *inter alia*, acts otherwise permitted or administered by any regulatory board or officer under state or federal statutory authority.<sup>138</sup>

The Act was amended in 1975 to expand the Commissioner's authority to make regulations establishing unfair or deceptive acts, practices or methods in addition to those determined to be unfair or deceptive under FTC Act jurisprudence,<sup>139</sup> and again in 1976 to eliminate the requirement that private enforcement be based on an act, practice or method previously determined unlawful by the Commissioner or the FTC.<sup>140</sup> The legislature noted the legislative history of

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136. Act of Jun. 15, 1973, 73-615 § 2(b), 1973 Conn. Acts 1387 (Reg. Sess.) (codified at CONN. GEN. STAT. § 42-110b(c) (1987)); see also Langer & Ormstedt, *supra* note 134, at 388, 389 (1980).

137. Act of Jun. 15, 1973, 73-615 § 7, 1973 Conn. Acts 1387, 1391 (Reg. Sess.). This language was originally codified at CONN. GEN. STAT. § 42-110g(a), but was subsequently deleted by Act of Jan., 1979, 79-210 § 1, 1979 Conn. Acts 206 (Reg. Sess.), discussed *infra* note 146 and accompanying text. See also Langer & Ormstedt, *supra* note 134, at 390.

138. Act of Jun. 15, 1973, 73-615 § 3, 1973 Conn. Acts 1387 (Reg. Sess.) (codified at CONN. GEN. STAT. § 42-110c(a) (1987)); see also Langer & Ormstedt, *supra* note 134, at 391-92.

139. Act effective Jul. 1, 1975, 75-618 § 1, 1975, 1975 Conn. Acts 976 (Reg. Sess.) (codified at CONN. GEN. STAT. § 42-110b(c) (1987)). Originally, 75-618 was codified as § 42-110b(b), but in 1976 the Connecticut legislature Act of Jun. 1, 1976, 76-303, 1976 Conn. Acts, which, *inter alia*, re-arranged the changes introduced by 75-618 to be at § 42-110b(c). The legislature then inserted a new subsection to be at § 42-110b, discussed *infra* note 142 and accompanying text. See also Langer & Ormstedt, *supra* note 134, at 391. The word "methods" was also added by this amendment.

140. Act of Jun. 1, 1976, 76-303 § 1, 1976 Conn. Acts, 387 (Reg. Sess.) (codified at CONN. GEN. STAT. § 42-110b(a) (1987)). The elimination of the requirement that private enforcement be based on an act previously determined unlawful is actually found by reading Conn. Gen. Acts § 42-110g(a) and § 42-110b(a) in conjunction. Section § 42-110g(a) provides for private enforcement consistent with § 42-110b; it is in § 42-110b(a) that the requirement concerning previous determination of unlawfulness was deleted. See also Langer & Ormstedt, *supra* note 134, at 391.

the FTC Act, acknowledging the impossibility of defining all unfair trade practices, and reiterated the desire for a statute that would enable the Commissioner to challenge unfair or deceptive practices as they arise.<sup>141</sup> The 1976 amendments substituted a provision that Connecticut courts should be guided by FTC Act jurisprudence in defining the Act's prohibitions,<sup>142</sup> and added an express statement that the Act should be construed as a remedial statute.<sup>143</sup> The exemption section was also narrowed, to except from coverage only those acts *otherwise permitted* under other regulatory law.<sup>144</sup>

In response to a Superior Court decision holding the Act inapplicable in a landlord-tenant context, the legislature amended the definition of "trade or commerce" to include "rent or lease" in 1978.<sup>145</sup> Also, in response to litigation over whether the Act's protection reached business and competitor plaintiffs, it was again amended in 1979 to broaden standing by declaring private relief available to "any person who suffers any ascertainable loss," removing the qualification of "who purchases or leases . . . primarily for personal, family or household purposes."<sup>146</sup> Finally, after a decision construing the Act

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141. Langer & Ormstedt, *supra* note 134, at 397 (citing remarks of Rep. Raymond Ferrari concerning Raised Committee Bill No. 5867, 1976 Journal of the House of Representatives, vol. 19, part 6, at 2190-91(1980)).

142. Act of Jun. 1, 1976, 76-303 § 1, 1976 Conn. Acts, 387 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110b(b) (1987)); *see also* Langer & Ormstedt, *supra* note 134, at 391.

143. Act of Jun. 1, 1976, 76-303 § 1, 1976 Conn. Acts, 387 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110b(d) (1987)).

144. Act of Jun. 1, 1976, 76-303 § 2, 1976 Conn. Acts, 387, 388 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110c(a) (1987)). These legislative changes are generally credited as attempts to overcome obstacles to private enforcement of the Act. *See also* Langer & Ormstedt, *supra* note 134, at 390-94. Another significant aspect of the 1976 amendment was to change the authority to award attorneys fees from "winning party" to "successful plaintiff," and tying amount of allowable fees to the amount of work done rather than the amount of plaintiff's recovery. Act of Jun. 1, 1976, 76-303 § 3, 1976 Conn. Acts, 387, 388 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110g(d) (1987)).

145. Act of Jun. 1, 1978, 78-346, § 1, 1978 Conn. Acts 757 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110a(4) (1987)). *See also* Langer & Ormstedt, *supra* note 134, at 394, citing Danbury Tenants Ass'n v. Hovi (Super. Ct., Fairfield Cty.), No. 163318, 3 CONN. L. TRIB. No. 37 (May 25, 1977).

146. Act of Jan. 1979, 79-210, § 1, 1979 Conn. Acts 206 (Reg. Sess.) (codified at CONN. GEN. STAT.. § 42-110g(a) (1987)). For original language *see supra* note 137 and accompanying text. *See also* Langer & Ormstedt, *supra* note 134, at 394-95 nn.34-37, where Langer states that the legislative history of the 1979 amendment indicates that it was a technical clarification, and not a substantive change in the



to require a private plaintiff to demonstrate a nexus between plaintiff's claim and some public interest, the Act was amended in 1984 to specifically eliminate such a requirement for private and governmental enforcement.<sup>147</sup> Thus, the legislative response to application and construction of the Connecticut Act, in the form of legislative amendment, has been exclusively an effort to expand application of the Act.

The Connecticut legislature has included specific provisions in several subsequently enacted statutes declaring that violations of the specific act are also violations of the Unfair Trade Practices Act.<sup>148</sup> By contrast, in at least one other statute, the legislature expressly exempted the statutory subject matter from application of the Unfair Trade Practices Act.<sup>149</sup> Thus, the legislation itself has ceased to provide for wholesale exemptions of those areas subject to other sources of regulation,<sup>150</sup> and the legislature clearly has indicated an intent that this general legislation overlap with some other more specific legislation.<sup>151</sup>

Connecticut courts, and federal courts applying Connecticut law, have interpreted the state's Unfair Trade Practices Act broadly, but consistently with legislative intent. In *Bailey Em-*

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reach of the statute (citing remarks of Rep. Robert F. Frankel concerning Raised Committee Bill No. 7810, 1979 Journal of the House of Representatives, Vol. 22, Part 10, p. 3338).

147. Act of Jun. 8, 1984, 84-468, § 2, 1984 Conn. Acts 798, 799 (Reg. Sess.) (codified at CONN. GEN. STAT. § 42-110g(a) (1987)). Amendment followed decision in *Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc.*, 190 Conn. 528, 461 A.2d 1369 (1983). See also Kenneth C. Bartlett & Michael F. Romano, *Connecticut Unfair Trade Practices Act and Connecticut Unfair Insurance Practices Act: Expanding Legal Horizons*, 58 CONN. BAR J. 302, 309-11 (1984).

148. Peter L. Costas, *Unfair Competition and Unfair Trade Practices Transplants to the Unfair Trade Practices Act*, 54 CONN. BAR J. 405, 407-08 (1980); see Morgan, *supra* note 70, at 90 (1988).

149. CONN. GEN. STAT. § 12-329 (1987). This section was repealed, effective June 11, 1986. Act of Jun. 11, 1986, 86-403, § 128, 1986 Conn. Acts 1085, 1148 (Reg. Sess.).

150. See Morgan, *supra* note 70, at 82-83. See also Lefevre, *supra* note 120, and accompanying text.

151. See generally Costas, *supra* note 148; see also Morgan, *supra* note 70, at 92-94. Both of these articles also discuss and support the proposition that the legislature intended this general legislation to overlap and augment traditional common law claims.

The specific exemption for cigarette sales buttresses the argument that the legislature perceived the unfair trade practices act to be generally coextensive with other regulations. See *supra* note 149.

*ployment System v. Hahn*, the Act was applied to grant relief to a franchisee induced to enter into a franchise agreement by misleading representations and omissions relating to earnings claims, attrition rates and related litigation involving the franchisor.<sup>152</sup> As the court pointed out, such application was consistent with FTC Act jurisprudence,<sup>153</sup> but would be independently within the power of the state court by virtue of the statutory amendments enlarging the authority of the courts to declare acts or practices unlawful and specifying remedial construction.<sup>154</sup> The court noted that a franchise, as a form of license or privilege to do business, is certainly a "commodity or thing of value,"<sup>155</sup> and that the franchisee was clearly a "person" who suffered an ascertainable loss.<sup>156</sup> The state supreme court in *McLaughlin Ford, Inc. v. Ford Motor Co.*, wherein a franchisee challenged the franchisor's grant of another competing dealership to operate within close proximity to the plaintiff's dealership, reiterated that the legislature had evidenced no intent to limit application of the Act, and so found it broad enough to protect business persons or competitors from unfair acts or practices not involving traditional consumer injuries.<sup>157</sup> A Connecticut superior court also has ruled in *Poquonnock Avenue Associates v. Society for Savings*<sup>158</sup> that giving and collecting loans is a "distribution of services or property," and therefore the Unfair Trade Practices Act encompasses lending activities of banks. Here again, the act was applied to the commercial activities of a real estate partnership, and involved a threat of foreclosure of a commercial mortgage.<sup>159</sup>

With regard to debt collection activities, the superior court in *Murphy v. McNamara* included post-sale collection efforts within its analysis and injunctive relief resulting from

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152. 545 F. Supp. 62 (D. Conn. 1982).

153. *Id.* at 66 n.4.

154. *Id.* at 71.

155. *Id.* at 66.

156. *Id.* at 72.

157. 473 A.2d 1185, 1190 (1984). Although the court specifically found the unfair trade practices act applicable in this context, it found that plaintiff had shown no violation of the act by the defendant.

158. Jonathan A. Sheldon, *Unfair and Deceptive Acts and Practices* 2.2.1 (National Consumer Law Center) (Supp. 1982) (citing *Poquonnock Avenue Assoc. v. Society for Savings*, No. 238670, Clearinghouse No. 31,045, (Conn. Super. Ct. (1980)).

159. *Id.*

the unfair trade practices involved with the conditional sale of a television set, treating both behaviors as parts of a single transaction.<sup>160</sup> The federal district court in *Tillquist v. Ford Motor Credit Co.*<sup>161</sup> held that collection efforts in violation of banking regulations promulgated under the Connecticut Creditor's Collection Practices Act<sup>162</sup> represented a practice amounting to a breach of public policy which then constituted a violation of the Unfair Trade Practices Act.<sup>163</sup> That court relied in part upon an earlier decision, *Barco Auto Leasing Corp. v. House*,<sup>164</sup> employing the Unfair Trade Practices Act to afford additional remedies to those available to plaintiff because of defendant's breach of the Connecticut Retail Installment Sales Financing Act.<sup>165</sup> Likewise, the Unfair Trade Practices Act has been held applicable to provide an additional remedy for tenants injured by landlords' failure to obtain certificates of occupancy for substandard housing in *Conaway v. Prestia*.<sup>166</sup>

In each of these cases, the courts have acted on the basis of one of the *Sperry & Hutchinson* criterion<sup>167</sup> for defining an unlawful practice: "Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness."<sup>168</sup> In doing so, they were looking to FTCA jurisprudence for guidance in determining the parameters of the state act's reach, consistently with the legislative directive.<sup>169</sup> The Connecticut courts also have held that

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160. 416 A.2d 170, 180 (Conn. Super. Ct. 1979). This case involved a rent-to-own plan that the court found was actually a conditional sale. *Id.* at 174.

161. 714 F. Supp. 607 (D. Conn. 1989).

162. CONN. GEN. STAT. § 36-243b (1987).

163. 714 F. Supp. at 616.

164. 520 A.2d 162 (Conn. 1987).

165. CONN. GEN. STAT. § 42-83 to § 42-100(a) (1987).

166. 464 A.2d 847 (Conn. 1983).

167. See *Murphy v. McNamara*, 416 A.2d at 175; *Tillquist v. Ford Motor Credit Co.*, 714 F. Supp. 607, 616 (D. Conn. 1989); *Conaway v. Prestia*, 464 A.2d at 847, 852 (Conn. 1983).

168. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245 n.5 (1972) (quoting *Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health and Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964) (codified at 16 C.F.R. § 408 (1989))). Adopted by the Connecticut Supreme Court in *Conaway v. Prestia*, 464 A.2d 847, 852 (Conn. 1983). See also *supra* note 112.

169. *Conaway v. Prestia*, 464 A.2d 847 (Conn. 1983); CONN. GEN. STAT. §

the legislature manifested an intent to subject insurance practices to the Unfair Trade Practices Act as well as the more specific Unfair Insurance Practices Act.<sup>170</sup> The state supreme court in *Mead v. Burns* cited with approval the reasoning of a Massachusetts supreme court decision interpreting a similar statute, holding that the mere existence of one regulatory statute does not affect the applicability of a broader statute not in conflict with the former, especially where neither has language of exclusivity.<sup>171</sup>

The Connecticut Supreme Court reached a contrary result in the context of regulation of the purchase and sale of securities in *Russell v. Dean Witter Reynolds, Inc.*<sup>172</sup> The court acknowledged the breadth of the definition of "trade or commerce" in the Unfair Trade Practices Act<sup>173</sup> and the absence of preemptive authority in the state Uniform Securities Act,<sup>174</sup> but based its decision not to apply the general statute upon its interpretation of FTC Act jurisprudence.<sup>175</sup> It found that the FTC had never undertaken to regulate the securities industry, presumably because of the comprehensive regulatory scheme provided by the Securities and Exchange Commission.<sup>176</sup> In contrast, it cited the McCarran-Ferguson Act, a federal law which specifically recognizes some regulation of insurance practices by the FTC,<sup>177</sup> as support for the application of the state Unfair Trade Practices Act to the insurance industry.<sup>178</sup> The court had earlier undertaken a similar analysis to conclude, in *Heslin v. Connecticut Law Clinic*, that the Unfair Trade Practices Act could reach attorney conduct.<sup>179</sup> Noting that the definition of "trade or commerce" seems to

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42-110(b) (1987).

170. CONN. GEN. STAT. § 38a-815, 38-816 (1990). See *Mead v. Burns*, 509 A.2d 11, 18 (Conn. 1986); *Doyle v. St. Paul Fire & Marine Ins. Co.*, 583 F. Supp. 554, 556 (D. Conn. 1984); *Bartlett & Romano*, *supra* note 147, at 311-15.

171. 509 A.2d 11, 18 (Conn. 1986) (citing *Dodd v. Commercial Union Ins. Co.*, 365 N.E.2d 802, 805 (Mass. 1977)).

172. 510 A.2d 972 (Conn. 1986).

173. *Id.* at 976.

174. *Id.*

175. *Id.*

176. 510 A.2d at 977. For criticism of the decision see *Morgan*, *supra* note 70, at 84-86.

177. 15 U.S.C. § 1012(b) (1988).

178. 510 A.2d at 976-77.

179. 461 A.2d 938 (Conn. 1983).

include the provision of legal services, the court found the extension of coverage clearly justified by the U.S. Supreme Court's application of the FTC Act to other professionals, and the FTC's position that law and other state-regulated professions are not exempted from coverage under the FTC Act.<sup>180</sup> Again, this reference to FTC Act jurisprudence is according to the legislative directive.

In summary, Connecticut courts have been pressed toward broader interpretations of the Act by the legislature. The legislature has followed a consistent course of expanding the reach of the act, both independently and in swift and clear reactions to the courts' limiting constructions of the act. The courts have responded by literally following the language, and changes in language, used by the legislature. Additionally, the courts have adhered closely to the legislature's instruction to look to the interpretations and applications of the related federal law when defining the parameters of the state act. Therefore the expansion of coverage of the Connecticut Act cannot be attributed to judicial activism.

#### B. *Illinois*

In 1961, the Illinois legislature passed the Consumer Fraud Act "to protect consumers and borrowers against fraud and certain other practices by or on behalf of sellers and lenders of money and to give the Attorney General certain powers and duties for the enforcement thereof."<sup>181</sup> The Act prohibited deception, fraud, false pretense, false promise, misrepresentation or intentional suppression of material facts in connection with the sale or advertisement of merchandise.<sup>182</sup> In 1965, Illinois also adopted the Uniform Deceptive Trade Practices Act, intended to address specifically the law of unfair competition in the area of false, concealing, or deceptive trade identification, and false, confusing, or deceptive representations as to the source or origin of goods.<sup>183</sup> In 1973, the Illi-

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180. *Id.* at 942-43.

181. Consumer Fraud Act, 1961 Ill. Laws 1867, pmb. (codified as amended at ILL. REV. STAT. ch. 121 1/2 paras. 261-272 (Supp. 1991)).

182. Consumer Fraud Act, 1961 Ill. Laws 1867-71, (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 262 (Supp. 1991)). See McDonald, *infra* note 191, at 95 n.2 (citing H.R. 629, 72nd Assembly).

183. Uniform Deceptive Trade Practices Act, 1965 Ill. Laws 2647 (codified as

nois Consumer Fraud Act was amended to become the Consumer Fraud and Deceptive Business Practices Act, which was modeled after the FTC Act and incorporated, by direct reference, portions of the Uniform Deceptive Trade Practices Act.<sup>184</sup> The enunciated purpose became "to protect consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."<sup>185</sup> "Consumers" are defined as persons who purchase or contract for the purchase of merchandise for personal, not business, use; "merchandise" includes objects, wares, goods, commodities, intangibles, real estate outside of the state, and services; and "trade" or "commerce" involves the advertising, offering, sale or distribution of any services, property, tangible or intangible, real, personal or mixed, articles, commodities or things of value.<sup>186</sup> The amendment directed courts applying the act to give consideration to FTC Act jurisprudence.<sup>187</sup> By separate provision, the legislature directed that the Act be liberally construed.<sup>188</sup> Another very significant effect of the amendment was the creation of a private right of action to persons damaged by a violation of the Act.<sup>189</sup> The amendment exempted actions or

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amended at ILL. REV. STAT. ch. 121 1/2, paras. 311-69 (Supp. 1990)). See Phillip W. Tone & Thomas L. Toualo, *Prefatory Illinois Notes*, ILL. REV. STAT. ch. 121 1/2 (Supp. 1990). A person likely to be damaged by the deceptive trade practice of another may seek injunctive relief. *Id.* at para. 313.

184. Consumer Fraud and Deceptive Business Practices Act, 1973 Ill. Laws 78-904 (codified as amended at ILL. REV. STAT. ch. 121 1/2 para. 262 (Supp. 1991)). The amended act retained the listed prohibitions of the original act as an illustrative, but not exhaustive, list of examples of unfair or deceptive acts or practices. It also directed that any practice in violation of § 2 of the Uniform Deceptive Trade Practices Act (including eleven specific practices, and any other conduct which similarly creates a likelihood of confusion or misunderstanding) was unlawful. See also *supra* note 1; Karns, *supra* note 126, at 47.

185. Consumer Fraud and Deceptive Business Practices Act, 1973 Ill. Laws 78-904 (codified as amended at ILL. REV. STAT. ch. 121 1/2 para. 261 (Supp. 1990)).

186. *Id.*

187. Consumer Fraud and Unfair Business Practices Act, 1973 Ill. Laws 78-904 § 2 (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 262 (Supp. 1990)).

188. Consumer Fraud and Unfair Business Practices Act, 1973 Ill. Laws 78-904 § 11a (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 271a (Supp. 1990)).

189. Consumer Fraud and Unfair Business Practices Act, 1973 Ill. Laws 78-904 § 10a (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 270a (Supp. 1990)). This amendment also provided for award of reasonable attorney's fees and

transactions specifically authorized by other state and federal regulatory laws.<sup>190</sup>

Much of the litigation under the Illinois Act has dealt with the question of whether private litigants are limited to redress for injuries suffered in conjunction with conduct that has some "public effect."<sup>191</sup> There has been a split among courts as to whether to apply this "public effect" requirement at all, and whether to apply it only to business versus consumer plaintiffs.<sup>192</sup> The legislature has now addressed the issue by inserting a qualification in the private remedy section of the statute that "[p]roof of a public injury, a pattern, or an effect on consumers generally shall not be required."<sup>193</sup>

Illinois courts applying the Act have used a fairly literal approach to defining its coverage. Thus, in *Fox v. Industrial Casualty Insurance Co.*<sup>194</sup> the sale of insurance was deemed to involve a sale of "service" and insureds were deemed to be "consumers" within the contemplation of the Act. The court recognized that the appropriate remedy for deceptive insurance practices was outside of and in addition to those available under the Illinois Insurance Code.<sup>195</sup> Similarly, purchasers of investment securities and commodities futures were held to be "consumers" and the products were found to be "intangible property" under the Act.<sup>196</sup> By contrast, an unsuccessful applicant to medical school was not a "consumer" since he did

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costs to a prevailing party. *Id.*

190. Consumer Fraud and Unfair Business Practices Act, 1973 Ill. Laws 78-904 § 10b (codified as amended at ILL. REV. STAT. ch. 121 1/2, § H 270b (Supp. 1990)). This exemption section was later amended to include an exemption for innocent misrepresentations by sellers of real estate. 1982 Ill. Laws 82-766, § 1. A similar exemption is provided for under the Uniform Deceptive Trade Practices Act. 1982 Ill. Laws 82-766 § 1 (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 314. (Supp. 1990)).

191. See Barbara A. McDonald, *The Applicability of the Illinois Consumer Fraud and Deceptive Business Practices Act to Private Wrongs*, 39 DEPAUL L. REV. 95 (1989).

192. *Id.* at 96-97.

193. Consumer Fraud and Unfair Business Practices Act, 1989 Ill. Laws 86-801 § 1 (effective Jan. 1, 1990) (codified as amended at ILL. REV. STAT. ch. 121 1/2, 270a (Supp. 1990)).

194. 424 N.E.2d 839 (Ill. Ct. App. 1981).

195. *Id.* at 841-42. See ILL. REV. STAT. ch. 73, paras. 613-1504.9 (Supp. 1990).

196. See, e.g., *Heinold Commodities Inc. v. McCarty*, 513 F. Supp. 311 (N.D. Ill. 1979); *Onesti v. Thomson McKinnon Securities, Inc.*, 619 F. Supp. 1262 (N.D. Ill. 1985).

not purchase, or contract to purchase, "merchandise."<sup>197</sup> Furthermore, since the definition of "person" is not limited to merchants or business persons and a cause of action is not limited to unfair or deceptive acts by merchants or business persons, the Act has been deemed applicable against private sellers.<sup>198</sup> In *People ex rel. Scott v. Cardet International*,<sup>199</sup> the appellate court recognized the intended expansion of the Act by the 1973 amendment.<sup>200</sup> The court, asked to apply the earlier version of the Act in the context of the sale and financing of marketing franchises, asserted that the Act's definition of "merchandise" to include "any objects, wares, goods, commodities, intangibles, real estate situated outside the State of Illinois, and services"<sup>201</sup> clearly encompassed the franchises at issue, which represented a sale of both intangible property and services.<sup>202</sup> However, the court went on to conclude that the legislature, in specifically defining "consumer" in a preceding section of the Act, evidenced an intent to protect only "persons" acting in the capacity of "consumers."<sup>203</sup> The court buttressed its narrower interpretation with a comparison of the expansion of coverage through changes wrought by the 1973 amendments, specifically the inclusion of protection of "businessmen" and the substitution of protection from unfair and deceptive practices "in the conduct of any trade or commerce" in place of protection from such practices merely "in connection with the sale or advertisement of merchandise."<sup>204</sup> Thus, the later version of the act protects a much wider variety of plaintiffs.

Courts which have subsequently applied the amended Act have found the broadening language to indicate an intent to expand the Act's coverage.<sup>205</sup> *People ex rel. Daley v. Datacom*

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197. *Steinberg v. Chicago Medical Sch.*, 371 N.E.2d 634, 638 (Ill. 1977).

198. *People ex rel. Scott v. Larance*, 434 N.E.2d 5 (Ill. App. Ct. 1982) (Act applied to allow relief against private seller of automobile for misrepresentation of actual mileage).

199. 321 N.E.2d 386 (Ill. App. Ct. 1974).

200. *Id.* at 392.

201. *Id.* (citing 1973 Ill. Laws 78-904 (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 261(b) (Supp. 1990))).

202. 321 N.E.2d at 390.

203. 321 N.E.2d at 390-91; see 1973 Ill. Laws 78-904 ILL. REV. STAT. ch. 121 1/2, para. 261 § 1(e) and § H2624 (1968) (Supp. 1990).

204. 321 N.E.2d at 391-92.

205. See, e.g., *Scott v. Ass'n for Childbirth at Home, Int'l*, 430 N.E.2d 1012 (Ill.



*Systems*<sup>206</sup> challenged, under both the consumer protection legislation and the Uniform Deceptive Trade Practices Act, the activities of an agency which had contracted with the city of Chicago to collect parking fines. The appellate court did not doubt that debt-collection services were within the ambit of the consumer protection afforded by the Act, and held that the Act's definition of "trade or commerce" did not differentiate between consumer debts and any other type of debt.<sup>207</sup> Additionally, the conduct fell within the prohibition of deceptive conduct in the sale of services under the Uniform Deceptive Trade Practices Act.<sup>208</sup> The conduct of this independent contractor was not protected by the exemption for activity authorized by other government regulation.<sup>209</sup> Evaluation of these claims was independent of the existence of regulatory control over the activity under the Illinois Collection Agency Act.<sup>210</sup>

The court in *Beard v. Gress* also found the 1973 changes, which expanded of the Act to protect against unfair or deceptive conduct in the conduct of "any trade or commerce," mandated the inclusion of the sale of domestic real estate, regardless of whether the purchasers are "consumers."<sup>211</sup> The court reasoned that the legislature's switch from the narrower prohibition against deception and misrepresentation in connection with the sale of merchandise, without a concurrent change in the definition of "consumer," along with the adoption of a distinct and expansive definition of "trade or commerce," evidenced an intent to abandon the former requirement that only persons functioning as "consumers" were protected.<sup>212</sup> The court also pointed out the incongruity of the alternative holding, which would have protected business purchasers of real estate while denying similar protection to other citizens.<sup>213</sup>

Under the mandate that the Act be liberally construed, the leasing of spaces for mobile homes and the provision of

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1981).

206. 531 N.E.2d 839 (Ill. App. Ct. 1988).

207. 531 N.E.2d at 845.

208. *Id.* at 846.

209. *Id.* at 847.

210. *Id.* at 839.

211. 413 N.E.2d 448, 452 (Ill. App. Ct. 1980).

212. *Id.* at 451-52.

213. *Id.* at 452.

utilities constituted a "distribution of services" as encompassed by the term "trade or commerce," and lessees thereof who were required to pay service fees were found to be "consumers."<sup>214</sup> Remedies under the consumer protection legislation were deemed independent of remedies available under the Mobile Home Landlord and Tenant Act.<sup>215</sup> Similarly, *Carter v. Mueller* held the Act applicable where a tenant was induced to lease a residential apartment by the landlord's misrepresentations of the apartment's condition, and maintenance and utility services.<sup>216</sup> Not only did the court find that provision of apartment-related services brought the conduct within the coverage of the Act, but it found the definition of "trade or commerce," including "the distribution of . . . any property, . . . real, personal or mixed," to be broad enough to encompass the landlord-tenant relationship.<sup>217</sup> The purchase of apartment-related services was found to bring the tenant within the statutory definition of "consumer."<sup>218</sup>

A federal court applying the Illinois Uniform Deceptive Trade practices Act before its incorporation into the Consumer Fraud Act, found that application extended to debtor-creditor relations.<sup>219</sup> The court asserted that it would require an artificially narrow interpretation of the Act to find it to apply to any practices used to effect a sale, but not to those practices utilized in financing that same sale.<sup>220</sup> It also noted that the "catch-all" category following the eleven listed prohibited activities was specifically designed to permit courts to address new and different deceptive trade practices.<sup>221</sup> This analysis should now apply to the Consumer Fraud and Deceptive Trade Practices Act via the 1973 amendment.<sup>222</sup> The state appellate court in *Exchange National Bank v. Farm*

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214. *People ex rel. Fahner v. Hedrich*, 438 N.E.2d 924, 928 (Ill. App. Ct. 1982); *Accord People ex rel. Fahner v. Testa*, 445 N.E.2d 1249 (Ill. App. Ct. 1983).

215. Mobile Home and Landlord-Tenant Act (ILL. REV. STAT. ch. 80, para. 201-26 (1979)).

216. 457 N.E.2d 1335 (Ill. App. Ct. 1983).

217. *Id.* at 1341-42 (citing ILL. REV. STAT. ch. 121 1/2, para. 261(f) (1981)).

218. 457 N.E.2d at 1342.

219. *Garland v. Mobil Oil Corporation*, 340 F. Supp. 1095 (N.D. Ill. 1972).

220. *Id.* at 1099.

221. *Id.* (citing Richard F. Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 493, 498 (1967)).

222. *See supra* note 184.

*Bureau Life Insurance* acknowledged that the amended act applied to mortgage lenders, but failed to find an actionable violation where only an isolated breach of contract was alleged.<sup>223</sup> That court applied a "public effect" requirement,<sup>224</sup> on the theory that the absence of a pattern of unfair or deceptive conduct would render the Act a redundant remedy for all individual breach of contract claims.<sup>225</sup> As noted above, the Illinois legislature has since specifically rejected the "public effect" requirement.<sup>226</sup>

An arena wherein the Illinois courts have refused to extend the coverage of the consumer protection legislation is that of the professional practices. The issue first arose in the context of a legal malpractice claim in *Frahm v. Urkovich*.<sup>227</sup> The court reasoned that, while certain commercial aspects of the legal profession might be subject to trade regulation,<sup>228</sup> the actual practice of law was not the equivalent of an ordinary commercial enterprise, and was therefore outside the legislature's contemplation of "trade or commerce."<sup>229</sup> That reasoning was cited with approval in *Guess v. Brophy*, wherein the court also noted that the practice of law is subject to other more stringent regulation than most commercial services.<sup>230</sup> *Feldstein v. Guinan* adopted the same rule relating to the practice of medicine where a physician complained of a breach of contract regarding his admission to a residency program.<sup>231</sup>

Thus, the Illinois courts have attempted to apply the "plain meaning" of the words of the statute in determining its applicability in various new situations. Their analyses have

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223. 438 N.E.2d 1247 (Ill. App. Ct. 1982).

224. *Id.* at 1249-50. See *supra* notes 191-93 and accompanying text.

225. 438 N.E.2d at 1250. For a criticism of the decision, see McDonald, *supra* note 191, at 97-98.

226. See *supra* notes 191-93 and accompanying text.

227. 447 N.E.2d 1007 (Ill. App. Ct. 1983).

228. *Id.* at 1010. The court noted that adoption of a minimum fee schedule by a county bar association had been determined to be subject to federal antitrust legislation in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), but noted that the *Goldfarb* decision also had stated that "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities." *Id.* at 788-89 n.17. The court also took note of the language of *Scott v. Ass'n for Child-birth at Home, Int'l*, referring to the stated purpose of the act to protect from unfair and deceptive business practices. 430 N.E.2d 1012, 1017 (Ill. 1981).

229. 447 N.E. 2d at 1011.

230. 517 N.E.2d 693, 696 (Ill. App. Ct. 1988).

231. 499 N.E.2d 535 (Ill. App. Ct. 1986).

centered on the legislature's choice of wording brought about by the 1973 amendment of the statute. They have looked to the common definitions for those words, with attention to their context within the statute as a whole. The court opinions have generally heeded what changes the legislature made or did not make in the only major amendment to the Act, and have attempted to derive the most logical conclusions about legislative intent therefrom. Again, it cannot be said that these courts have acted in excess of legislative intent.

### C. *Massachusetts*

The Regulation of Business Practices and Consumer Protection Act was adopted by the Massachusetts legislature in 1967.<sup>232</sup> It prohibited unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.<sup>233</sup> The Act created no private cause of action, and sole enforcement authority was vested in the Attorney General.<sup>234</sup> The Attorney General was to be guided by FTC Act jurisprudence in construing the reach of the prohibition.<sup>235</sup> The Act was inapplicable to transactions or actions otherwise permitted under other state or federal regulatory schemes, to transactions of persons largely involved in interstate commerce, and to transactions already subject to some F.T.C action.<sup>236</sup>

In 1969, the Act was amended to create a private right of action for "any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any loss of money or property."<sup>237</sup> In 1971,

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232. Regulation of Business Practice and Consumer Protection Act, 1967 Mass. Acts 813, § 1 (codified at MASS. ANN. LAWS ch. 93A (Law. Co-op. 1985 & Supp. 1990)).

233. *Id.* § 2(a) (codified at MASS. ANN. LAWS ch. 93A § 2 (Law. Co-op 1985 & Supp. 1990)).

234. *Id.* § 4. See also Robert L. Spangenberg & Jayne Tyrrell, *Recent Developments in Consumer Law*, 60 MASS L.Q. 289 (1975). The Attorney General's enforcement authority was severely limited to cases where he could obtain a voluntary agreement or a consent order. *Id.* The act was later amended to substantially enlarge this enforcement authority. *Id.* at 290; 1969 Mass. Acts 690, 814.

235. 1967 Mass. Acts at § 3 (codified at MASS. ANN. LAWS ch. 93A, § 2(c) (Law. Co-op 1985 & Supp. 1990)).

236. *Id.* § 3.

237. 1969 Mass. Acts 690 § 9(1) (codified as amended at MASS. ANN. LAWS ch. 93A § 9(1) (Law Co-op. 1985 & Supp. 1990)). The amended act included a

the private remedy was specifically extended to aggrieved purchasers of real property for personal or family use.<sup>238</sup> The legislature subsequently specified that plaintiff need not exhaust administrative remedies, other than as specified in the Act, prior to seeking redress.<sup>239</sup> In a significant move, the legislature substantially enlarged the scope of actions under the Act by a 1979 amendment declaring that "[a]ny person, other than a person entitled to bring action under section 11 of this chapter, who has been injured by another person's use or employment of any method, act or practice declared unlawful by section two

... may bring an action ... for damages and ... equitable relief."<sup>240</sup> Not only did this amendment remove the "consumer" limitation, but it also opened up recovery for any type of injury, not just loss of money or property.<sup>241</sup> Finally, specific reference was added in 1987 to permit private recovery for unlawful methods, acts or practices in connection with any security or any contract of sale of a commodity for future delivery.<sup>242</sup>

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procedural requirement that plaintiff send in-state defendants a 30-day demand letter prior to initiation of suit.

238. Regulation of Business Practice and Consumer Protection Act, 1971 Mass. Acts 241 (codified as amended at MASS. ANN. LAWS ch. 93A § 9(1) (Law Co-op. 1985 & Supp. 1990)).

239. Regulation of Business Practice and Consumer Protection Act, 1973 Mass. Acts 939 (codified as amended at MASS. ANN. LAWS ch. 93A § 9(1) (Law Co-op. 1985 & Supp. 1990)). This change was apparently enacted in response to the state supreme court decision in *Gordon v. Hardware Mutual Casualty Co.*, 281 N.E.2d 573 (Mass. 1972), involving a claim that insurer's failure to notify insured of a change in policy constituted an unfair act, wherein the Supreme Judicial Court declined to grant relief under the consumer protection legislation prior to exhaustion of administrative remedies under several statutes regulating the insurance industry. See Robert L. Spangenberg & Jayne Tyrrell, *Recent Developments in Consumer Law*, 60 MASS. L.Q. 289, 291 (1975).

240. Regulation of Business Practice and Consumer Protection Act, 1979 Mass. Acts 406, §§ 1-2 (codified as amended at MASS. ANN. LAWS ch. 93A § 9(1) (Law Co-op. 1985 & Supp. 1990)). Section 11 applies to business plaintiffs and is discussed *infra* at notes 242-46 and accompanying text.

241. See, e.g., *Maillet v. ATF-Davidson Co., Inc.*, 552 N.E.2d 95, 99, n.8 (Mass. 1990) (printing press operator brought claim against the manufacturer to recover for injuries caused by press).

242. Regulation of Business Practice and Consumer Protection Act, 1987 Mass. Acts 664, § 3, (codified at MASS. ANN. LAWS ch. 93A, § 1 (Law. Co-op. 1985 & Supp. 1990)).

Business plaintiffs were extended the protections of the Act<sup>243</sup> by the 1972 addition of a private cause of action for "any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property . . . as a result of the use or employment by another person who engages in any trade or commerce, of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two."<sup>244</sup> Another amendment that year modified the language of section two to direct that private enforcement of the Act should also be guided by FTC act jurisprudence.<sup>245</sup> Section 11 was later amended to provide that courts applying the section should be guided by the provisions of the Massachusetts Antitrust Act, as well as FTC Act jurisprudence.<sup>246</sup> By amendment in 1985, the cause of action for business plaintiffs was limited to instances where both parties had a place of business in the Commonwealth at the time of the alleged injury,<sup>247</sup> but that limitation was removed by the legislature in 1986.<sup>248</sup>

The definition of "trade" and "commerce" has been correspondingly widened. In 1972, the renting and leasing of services and property were included,<sup>249</sup> and in 1987, securities and commodities futures were included.<sup>250</sup> The exemption

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243. Regulation of Business Practice and Consumer Protection Act, 1972 Mass. Acts 614 § 3 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law Co-op. 1985 & Supp. 1990)).

244. Regulation of Business Practice and Consumer Protection Act, 1972 Mass. Acts 614 § 3 (codified as amended at 1972 MASS. ANN. LAWS ch. 93A § 11 (Law Co-op. 1985 & Supp. 1990)).

245. Regulation of Business Practice and Consumer Protection Act, 1978 Mass. Acts 459 § 2(b) (codified as amended at MASS. ANN. LAWS ch. 93A § 2 (Law Co-op. 1985 & Supp. 1990)).

246. Regulation of Business Practice and Consumer Protection Act, 1978 Mass. Acts 459 § 3 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law Co-op. 1985 & Supp. 1990)).

247. Regulation of Business Practice and Consumer Protection Act, 1985 Mass. Acts 278 §§ 1-3 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law Co-op. 1985 & Supp. 1990)).

248. Regulation of Business Practice and Consumer Protection Act, 1986 Mass. Acts 363 §§ 1-4 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law Co-op. 1985 & Supp. 1990)).

249. Regulation of Business Practice and Consumer Protection Act, 1972 Mass. Acts 123 (codified as amended at MASS. ANN. LAWS ch. 93A § 1 (Law. Co-op. 1985 & Supp. 1990)).

250. Regulation of Business Practice and Consumer Protection Act, 1987 Mass. Acts 664 § 3 (codified as amended at MASS. ANN. LAWS ch. 93A § 9 (Supp.

section has been narrowed to cover only those transactions or actions otherwise permitted under other state or federal regulatory laws.<sup>251</sup>

By removing the requirements that persons seeking relief under the Act by private action have purchased or leased goods, property or services for personal, family or household use,<sup>252</sup> that the injuries to be redressed involve loss of money or property,<sup>253</sup> and by expanding the definition of "trade and commerce,"<sup>254</sup> the Massachusetts legislature has evinced a clear intent to make application of the Unfair Trade Practices Act quite expansive. The intent to protect business plaintiffs was manifested in the adoption of section 11 of the Act.<sup>255</sup> In light of these expansions of the Act's applicability, the narrowing of the exemption section of the Act indicates an intent to view the legislation as coextensive with other regulation.<sup>256</sup> Courts applying the Massachusetts law have acted according to this legislative directive. An illustrative case is *Dodd v. Commercial Union Insurance Co.*<sup>257</sup> This was a class action challenging settlement practices by the defendant insurance company under the state insurance laws.<sup>258</sup> The Massachusetts Supreme Court concluded that the broad sweep of the consumer protection legislation, including unfair practices in any trade or commerce, included insurance transactions within its reach because they involve sales of things of value and thus constitute commerce.<sup>259</sup> The court noted that the lack of FTC Act coverage of state insurance practices was not an impediment to this outcome, since insurance regulation was an area intended for state preeminence.<sup>260</sup> Additionally, the court found these transactions encompassed within the (then) narrower reach of

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1990)).

251. Regulation of Business Practice and Consumer Protection Act, 1983 Mass. Acts 242 (codified as amended at MASS. ANN. LAWS ch. 93A § 3 (Law. Co-op. 1985 & Supp. 1990)).

252. See *supra* notes 239-40 and accompanying text.

253. See *supra* notes 239-40 and accompanying text.

254. See *supra* notes 247-48 and accompanying text.

255. See *supra* notes 243-47 and accompanying text.

256. See *supra* note 250 and accompanying text.

257. 365 N.E.2d 802 (Mass. 1977).

258. *Id.* at 803, MASS. ANN. LAWS ch. 176D §§ 5-8. (Law. Co-op 1985 & Supp. 1990).

259. 365 N.E.2d at 806.

260. 365 N.E.2d at 806, n.6.

the private remedy section of the Act, which limited recovery to monetary or property losses associated with the sales of property or services, by characterizing the transactions as sales of personal property and services.<sup>261</sup> The existence of the more specific prohibition of "unfair or deceptive acts or practices in the business of insurance" by the insurance legislation<sup>262</sup> was not enough to preclude the applicability of the broader, nonconflicting consumer protection law, especially where the insurance law does not exclude application of other laws.<sup>263</sup>

This same reasoning was applied in *Lowell Gas Co. v. Attorney General*<sup>264</sup> to hold the act applicable to the practice of allocating short-term debt interest expense to inventory cost of gas charged to customers by privately owned utility companies.<sup>265</sup> Although a separate regulatory scheme existed,<sup>266</sup> that statute did not preclude overlapping authority to challenge practices that are not permitted or approved under the more specific regulation.<sup>267</sup> Likewise, the federal district court found in *Quincy Cablesystems v. Sully's Bar*<sup>268</sup> that the consumer protection statute is broad enough to apply to disputes in the area of communications, and that it is not preempted by the Federal Communications Act.<sup>269</sup>

In *Murphy v. Charlestown Savings Bank*,<sup>270</sup> a suit by mortgagors challenging defendant bank's practices relating to the servicing and foreclosure of a mortgage, the court examined the change in scope of private actions rendered by the 1979 amendment.<sup>271</sup> The case straddled the change, with the al-

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261. 365 N.E.2d at 806-807. However, recovery under this version of the Act was limited to actual purchasers of the policies, excluding additional insureds. *Id.* at 807.

262. MASS. ANN. LAWS ch. 176D § 2. (Law Co-op. 1985 & Supp. 1990).

263. 365 N.E.2d at 804-805.

264. 365 N.E.2d 240 (Mass. 1979). This case, as can be seen from the title, did not involve the private remedy section of the Act. *Id.*

265. *Id.*

266. MASS. ANN. LAWS ch. 164 (Law. Co-op. 1985 & Supp. 1990).

267. 385 N.E.2d at 244-45.

268. 684 F. Supp. 1138 (D. Mass. 1988).

269. *Id.* at 1143-44; 47 U.S.C. § 605 (1988).

270. 405 N.E.2d 954 (Mass. 1980).

271. *Id.* at 957. The court was able to avoid a direct determination of whether or not the Consumer Protection Act was applicable to banks, since it decided the case on a narrower issue. *Id.* at 957.



leged misconduct occurring before the adoption of the amendment.<sup>272</sup> The court noted that neither the ordinary definition of "purchase," the legislative history of the act, nor related laws supported treatment of a simple loan of money as a purchase, and therefore denied plaintiffs' right to recover under the status of "purchasers" as required by the earlier version of the Act.<sup>273</sup> It noted also, however, that the amendment seemed to remove restrictions on recovery based upon the nature of the transaction or plaintiff's status within that transaction by redefining the private cause of action to allow any person, other than a business plaintiff, injured by the unfair or deceptive act or practice of another to seek redress.<sup>274</sup>

The question of the applicability of the consumer protection law to banks, left open in the *Charlestown* case, was answered in *Raymer v. Bay State National Bank*.<sup>275</sup> In applying the Act in the context of a wrongful dishonor of business checks, the Massachusetts Supreme Court asserted that the activities of banks clearly constitute "trade or commerce."<sup>276</sup> The court further found that the exemption of banks under the FTC Act because of alternative applicable federal regulation did not require a similar exemption under the state consumer protection act, especially in light of the state act's application to other regulated financial institutions.<sup>277</sup> *Morse v. Mutual Federal Savings & Loan Assn.*<sup>278</sup> likewise applied the state statute to federal savings and loan associations.<sup>279</sup> That

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272. 405 N.E.2d at 957.

273. *Id.* at 957-961. In a footnote, the court dismissed an argument made in an amicus' brief, that certain aspects of the mortgage loan transaction may be characterized as additional "purchases," since the record in the case did not contain documents relevant to that argument. *Id.* at 958-959, n.12. However, in another mortgage case analyzed under the 1969 version of the Act, the mortgagee bank's involvement as a construction lender and procuror of a plot plan in connection with the mortgage transaction did not lead the court to a different result with regard to the plaintiffs standing to recover. *Danca v. Taunton Sav. Bank*, 429 N.E.2d 1129 (Mass. 1982).

274. 405 N.E.2d at 957.

275. 424 N.E.2d 515 (Mass. 1981).

276. *Id.* at 521.

277. *Id.* at 521 (citing, *inter alia*, *Dodd v. Commercial Union Ins. Co.*, 365 N.E.2d 802, 806 n.6 (Mass. 1977)). Note that this case involved a business plaintiff, and so did not give rise to the standing problems discussed in the *Charlestown* case, see *supra* notes 270-74 and accompanying text.

278. 536 F. Supp. 1271 (D. Mass. 1982).

279. 536 F. Supp. at 1280. Plaintiff wife's claims, arising under § 9 of the Act,

federal district court also found that the state law was not preempted by the Federal Home Owners' Loan Act,<sup>280</sup> since there was no evidence that Congress, by its regulation, intended to exclude all other incidental regulation, and no evidence of conflict or undue burden on the operations of federal savings and loan associations by reason of the dual regulation.<sup>281</sup>

With regard to the amendment specifically including the renting and leasing of property in the definition of "trade or commerce," the court in *Commonwealth v. De Cotis*<sup>282</sup> held that the legislature was clarifying rather than expanding the scope of the act, and that the leasing of lots for mobile homes constituted "trade or commerce" even applying the earlier version of the Act.<sup>283</sup> In any case, the amendment makes clear the applicability of the act to the rental of real property.<sup>284</sup> However, *Leardi v. Brown*<sup>285</sup> presented another issue in the landlord-tenant context, the scope of injury for which relief is available under the amended section 9 of the Act.<sup>286</sup> Tenants sued their landlord based on the inclusion of unlawful provisions in their leases, but failed to show that they were aware of these terms or that the landlord had ever attempted to enforce those provisions against them.<sup>287</sup> Examining the word "injury" in its usual sense, the court concluded that it meant the invasion of some legally protected interest usually, but not always, involving the infliction of some harm.<sup>288</sup> Consistent with interpretations of injury requirements in other contexts, the court here found a cognizable injury to tenants because of the landlord's invasion of their legally protected interest in

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failed under the *Charlestown* reasoning. However, plaintiff husband's claims, arising under § 11 of the Act, were extended relief.

280. 12 U.S.C. § 1464(a) (1988).

281. 536 F. Supp. at 1280.

282. 316 N.E.2d 748 (Mass. 1982).

283. *Id.* at 752.

284. Regulation of Business Practice and Consumer Protection Act, 1972 Mass. Acts 123 (codified as amended at MASS. ANN. LAWS ch. 93A § 1 (Law. Co-op. 1985 & Supp. 1990)).

285. 474 N.E.2d 1094 (Mass. 1985).

286. *Id.* at 1097. This case dealt with the 1979 amendment to § 9 discussed *supra* notes 240-41 and accompanying text.

287. 474 N.E.2d at 1097.

288. *Id.* at 1101.

being free from unlawful lease provisions.<sup>289</sup> In its analysis of the legislative intent behind the amendment to section 9, the court noted that the change was apparently, a partial reaction to override the court's earlier refusal to grant relief to plaintiff's claiming severe emotional distress, but who demonstrated no loss of money or property.<sup>290</sup>

When the Massachusetts Supreme Court was subsequently presented with another personal injury claim, in *Maillet v. ATC-Davidson Co.*,<sup>291</sup> it found no reason under the new version of the statute to exclude injury to the person from the general definition of injury.<sup>292</sup> In addition to referring to its analysis of the term in the *Leardi* case, the court noted that Texas courts had applied their consumer protection statute to cases of personal injury and that the FTC had concluded that failure to warn of defective or dangerous conditions threatening personal injury constitutes an "unfair" trade practice.<sup>293</sup>

In evaluating the scope of "trade or commerce," the Massachusetts courts have required some business or professional aspect of a defendant's participation in the challenged transaction to bring it within the Act's coverage. Thus, although the sale of a single family residence by a real estate developer is clearly encompassed by the statute,<sup>294</sup> the private sale of a residence by the homeowners, in *Lantner v. Carson*,<sup>295</sup> was deemed not to have been undertaken in the course of trade or commerce.<sup>296</sup> The court seemed to take for granted the Act's coverage of professional practices, at least in context of a fee arrangement between attorney and client, in *Guenard v. Burke*,<sup>297</sup> and went on to specifically declare in *Brown v.*

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289. *Id.* at 1102.

290. See *Baldessari v. Public Fin. Trust*, 337 N.E.2d 701, 709 (Mass. 1975); John Greaney, *Consumer Protection Law*, 65 MASS. L. REV. 88, 89 (1980); Paul Gitlin, *Consumer Law*, 1979 ANN. SURVEY MASS. LAW 333, 351-53.

291. 552 N.E.2d 95 (Mass. 1990).

292. *Id.* at 99.

293. *Id.* at 99-100 (citing *Keller Indus. v. Reeves*, 656 S.W.2d 221, 224 (Tex. Ct. App. 1983), and *In re International Harvester Co.*, 104 F.T.C. 949, 1064-67 (1984)).

294. See, e.g., *Brandt v. Olympic Constr. Inc.*, 449 N.E.2d 1231 (Mass. App. Ct. 1983).

295. 373 N.E.2d 973 (Mass. 1978).

296. *Id.* at 976.

297. 443 N.E.2d 892 (Mass. 1982).

*Gerstein*<sup>298</sup> that the practice of law constitutes "trade or commerce" under the consumer protection legislation.<sup>299</sup>

Courts applying the Massachusetts law have imposed similar constraints on business plaintiffs' claims under section 11 of the Act.<sup>300</sup> Since that section of the Act affords relief to plaintiffs engaged in business who suffer loss as the result of the conduct of a defendant engaged in business,<sup>301</sup> the court held in *Manning v. Zuckerman*<sup>302</sup> that the remedy was limited to individuals injured while acting in a business context with other business persons. In that case, plaintiff was afforded no remedy under section 11 for an alleged injury arising out of an employment relationship, since the legislature did not evidence any intent to reach dealings within a single business entity by addition of that section,<sup>303</sup> and since employment agreements do not constitute "trade or commerce" under the Act.<sup>304</sup> However, where the disputed actions involve a hiring practice or the post-employment relationship, as in *Mitchelson v. Aviation Simulation Technology*,<sup>305</sup> it may be within the scope of the Act's protections.<sup>306</sup>

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298. 460 N.E.2d 1043 (Mass. App. Ct. 1984). This case involved a malpractice claim rather than a claim limited to the commercial aspects of legal practice, i.e. advertisements, fee schedules, etc.

299. *Id.* at 1052.

300. See Regulation of Business and Consumer Protection Act, 1979 Mass. Acts 72 § 1 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law. Co-op. 1985)). Section 11 is the section granting a private right of action to persons engaged in trade or commerce who are injured by the unfair or deceptive acts or practices of another person engaged in trade or commerce. See *supra* notes 243-48 and accompanying text.

301. Regulation of Business and Consumer Protection Act, 1979 Mass. Acts 72 § 1 (codified as amended at MASS. ANN. LAWS ch. 93A § 11 (Law. Co-op. 1985)).

302. 444 N.E.2d 1262, 1263 (Mass. 1983).

303. *Id.* at 1265.

304. *Id.*; accord *Weeks v. Harbor Nat'l Bank*, 445 N.E.2d 605 (Mass. 1983).

305. 582 F. Supp. 1 (D. Mass. 1983).

306. The action was brought by the seller against the corporation and its purchaser in a transaction wherein the seller became an employee of the purchaser and alleged illegal coercion had been applied prior to the commencement of an employment relationship. This case also found the consumer protection law applicable to the sale of securities. 582 F. Supp. at 2. A later case, *Cabot Corp. v. Baddour*, reached a contrary conclusion based upon the comprehensiveness of the state regulatory scheme for the registration and sale of securities. 477 N.E.2d 399 (Mass. 1985). The legislature, however, specifically included the sale of securities and commodities futures within the scope of the Consumer Protection Act by amendment in 1987. Regulation of Business and Consumer Protection Act, 1987 Mass. Acts 664 § 1 (codified as amended at MASS. ANN. LAWS ch. 93A § 1 (Law.

Again, the expansion of the scope and application of the Massachusetts consumer protection law has been largely accomplished by legislative amendment. The courts have been attentive to these legislative messages, and have evaluated the intent of the legislature by comparing the amendments to the earlier versions of the Act. The only area wherein the courts have arguably spearheaded any expansion of coverage of the Act has been to find that its application coexists with other more specific regulatory schemes. Even there, the courts' actions seem to have been based on legislative action, and it is significant that this very active legislature has not reacted unfavorably to the courts' decisions finding the Act applicable in addition to more specific regulations and laws. It therefore cannot be declared that Massachusetts courts have contravened legislative intent in this area.

#### D. *New Jersey*

The New Jersey Consumer Fraud Act,<sup>307</sup> passed in 1960, was initially designed to permit the state Attorney General to investigate and prohibit deceptive and fraudulent advertising and selling practices damaging to the public.<sup>308</sup> The act prohibited "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby."<sup>309</sup> Sections 3 and 8 of the Act granted to the Attorney General investigative powers and authority to obtain injunctions for violations.<sup>310</sup> The reach of this prohibition was broadened by a 1967 amendment expanding the definition of

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Co-op. 1985 & Supp. 1990)).

307. 1960 N.J. Laws ch. 39, p. 137, §§ 1-12 (codified as amended at N.J. REV. STAT. §§ 56:8-1 to 56:8-48 (Supp. 1991)).

308. Sharon Bossmeyer, Note, *Re-Examining New Jersey's Consumer Fraud Act: Loopholes for Professionals?* 7 SETON HALL LEGIS. J. 45 (1983) (quoting S. 199, 189th Leg., 1st Sess. (1960)).

309. 1960 N.J. Laws ch. 39, p. 138, § 2 (codified as amended at N.J. REV. STAT. § 56:8-2 (Supp. 1991)).

310. 1960 N.J. Laws ch. 39, pp. 138, 140 (codified as amended at N.J. REV. STAT. §§ 56:8-3, 56:8-8 (1989)).

"advertisement" and adding "rental or distribution" to the definition of "sale."<sup>311</sup>

In response to a report critical of the Act's effectiveness in protecting consumers,<sup>312</sup> in 1971 the legislature expanded the act to include a private right of action for "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal," as a result of another person's violation of the Act, and to specify the award of treble damages under the private enforcement section.<sup>313</sup> That amendment also broadened the definition of unlawful practices to include "any unconscionable commercial practice" and the subsequent performance of covered persons,<sup>314</sup> and enlarged the enforcement powers of the Attorney General by providing that office with authority to order violators to restore monies or property unlawfully acquired to injured persons.<sup>315</sup>

The final basic extension of coverage of the Act by legislative amendment occurred in 1975, when real estate was specifically included within the protections of section 2.<sup>316</sup> Since that time, the legislature has also added numerous subsections which define specific unlawful practices.<sup>317</sup> A 1979 amendment specified that the rights and remedies provided for by the Act are cumulative to those available under common law or other statutes of the state.<sup>318</sup>

Courts applying the New Jersey law have tended to fix the Act's bounds by straightforward interpretation of the definitions and language utilized, attention to subsequent legislative proposals or amendments, and analysis of the potential conflict

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311. 1967 N.J. Laws ch. 301, § 2 (codified as amended at N.J. REV. STAT. § 56:8-2 (1989)). The amendment redefined advertisement, stating it "shall include the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." *Id.*

312. Bossmeyer, *supra* note 308, at 47-48 (quoting CENTER FOR ANALYSIS OF PUBLIC ISSUES, THE NEW JERSEY OFFICE OF CONSUMER PROTECTION—A PROMISE UNFULFILLED 5 (1970)).

313. 1971 N.J. Laws ch. 247, § 7 (codified at N.J. REV. STAT. § 56:8-19 (1989)).

314. *Id.* § 1 (codified as amended at N.J. REV. STAT. § 56:8-2 (1989)).

315. *Id.* § 3 (codified at N.J. REV. STAT. § 56:8-15 (1989)).

316. 1975 N.J. Laws ch. 294, § 1 (codified at N.J. REV. STAT. § 56:8-2 (1989)).

317. *See, e.g.*, N.J. REV. STAT. §§ 56:8-1.1, 56:8-2.1 to 2.23. (1989).

318. 1979 N.J. Laws ch. 347, § 5 (codified at N.J. REV. STAT. § 56:8-2.13 (1989)).

with the interpretation, enforcement or policy of other statutory regulatory schemes. Thus in *Neversoki v. Blair*,<sup>319</sup> wherein the purchasers of a house brought an action against the sellers and broker for concealing the existence of extensive termite damage in the house, the superior court held the act inapplicable for two reasons.<sup>320</sup> First, the court recognized a bill which was not passed until "real estate" was deleted from the definition of "merchandise" as a meaningful indication of legislative intent to leave real estate transactions outside the Act's coverage.<sup>321</sup> The court declined to give retroactive effect to a subsequent amendment expanding the Act to real estate despite a Governor's statement upon signing indicating that the amendment clarified rather than changed the reach of the original language.<sup>322</sup> The court reasoned that the "services" rendered by a real estate broker were fundamentally different than other types of commercial services covered by the earlier version of the Act, and thus were beyond its reach.<sup>323</sup> The court also found the Act inapplicable to the isolated sale of real estate by homeowners absent some clear evidence of legislative intent that such transactions were to be covered.<sup>324</sup>

However, applying the amended version of the Act in *Arroyo v. Arnold-Baker & Associates*,<sup>325</sup> the superior court found the amendment's language clear in its extension of coverage to real estate brokers, agents and salespersons.<sup>326</sup> The superior court in *DiBernardo v. Mosley*<sup>327</sup> likewise maintained the inapplicability of the amended Act to the isolated owner-sale of a single family residence since the legislature had not acted to overturn that portion of the ruling in the *Neversoki* case.<sup>328</sup> In *New Mea Construction v. Harper*,<sup>329</sup> the

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319. 358 A.2d 473 (N.J. Super. Ct. 1976).

320. *Id.* at 479-81.

321. *Id.* at 479-80.

322. *Id.* at 479-80 n.3.

323. *Id.* at 480-81.

324. *Id.* at 481.

325. 502 A.2d 106 (N.J. Super. Ct. 1985).

326. *Id.* at 108.

327. 502 A.2d 1166 (N.J. Super. Ct. 1986).

328. *Id.* at 1168. However, the court acknowledged that the 1976 amendment had already become effective at the time of the writing of the *Neversoki* opinion and so the legislature would have had to take additional amendment action to respond directly to that decision. *Id.* at 1168.

329. 497 A.2d 534 (N.J. Super. Ct. 1985).

superior court found that a custom homebuilder's substitution of substandard materials gave rise to a claim under the Act.<sup>330</sup> The materials used in the construction were deemed "merchandise sold" and the construction itself was deemed a "subsequent performance."<sup>331</sup> The homeowners fit squarely within the description of persons entitled to recover for loss under the private enforcement section of the act.<sup>332</sup> Finally, the plain language of the amended statute was found in *49 Prospect Street v. Sheva Gardens*<sup>333</sup> to apply to landlords as "sellers" and tenants as "consumers."<sup>334</sup> The definition of "sale" to include "rental," the inclusion of coverage of real estate transactions and the coverage of "subsequent performance" stemming from the "sale or advertisement of . . . real estate," all led the court to conclude that the ongoing aspects of the landlord-tenant relationship are within the reach of the Act.<sup>335</sup>

The definitions of "advertisement," "merchandise," and "person" were more fully analyzed by the superior court in *Morgan v. Air Brook Limousine*,<sup>336</sup> which concluded that the Act covers investment as well as consumer purchases.<sup>337</sup> That court noted that neither the Act's definition of "advertisement" as an attempt to induce any person to enter into any obligation or acquire interest in any merchandise, nor the Act's prohibition of any false or misleading conduct or suppression of relevant information in connection with the sale or advertisement of any merchandise, evidenced an intent to limit the Act's applicability to consumer retail sales or advertising practices.<sup>338</sup> This, in conjunction with the definition of "person" to include any natural person, legal representative, partnership corporation, company, trust, business entity or association, and the specific use of that term to identify both violators and aggrieved parties, led the court to conclude that the legislature intended the Act's protections to extend beyond mere

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330. *Id.* at 543.

331. *Id.* at 543.

332. *Id.* at 544.

333. 547 A.2d 1134 (N.J. Super. Ct. 1985).

334. *Id.* at 1141-42.

335. *Id.*

336. 510 A.2d 1197 (N.J. Super. Ct. 1986).

337. *Id.* at 1202.

338. *Id.* at 1200.



retail consumer transactions.<sup>339</sup> The court buttressed its conclusion by contrasting this Act with other statutes specifically defining "consumer" and restricting protection to individual purchasers of merchandise for personal, family or household purposes.<sup>340</sup> With regard to the franchise agreement at issue in the case, the court found that the franchisee's acquisition of the right to use the franchisor's trade name and good will, operational services and marketing assistance was clearly subsumed within the act's definition of "merchandise," which includes "commodities" and "services."<sup>341</sup> This interpretation of the statutory language was reiterated in *Hundred East Credit Corp. v. Eric Shuster*,<sup>342</sup> which declared that nothing in the statutory language supported a contention that the Act is inapplicable to the sale of merchandise for use in business operations.<sup>343</sup>

In a markedly different context, the definitional sections of the Act were examined in *Jones v. Sportelli*,<sup>344</sup> wherein the superior court determined whether the law covered plaintiff's claims for personal injuries sustained from insertion and use of an intrauterine device (IUD).<sup>345</sup> The court held that the provision of an IUD to a gynecologist is at least an "indirect attempt to sell" the IUD to a patient, and thus came within the statutory definition of "sale."<sup>346</sup> Under the private enforcement section of the Act, the plaintiff was entitled to recover treble damages for "ascertainable loss of moneys [sic] or property," which in this case involved the monies expended for purchase and insertion of the IUD and for medical services necessary for treatment or correction of the physical injuries sus-

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339. *Id.* at 1201.

340. *Id.* at 1201-02. The court noted another New Jersey statute expressly applicable to consumer transactions (Unit Price Disclosure Act, 1975 N.J. Laws ch. 242, §§ 1-5 (codified at N.J. REV. STAT. §§ 56:8-21 to 56:8-25 (1989)) and the Illinois Consumer Fraud Act, 1961 Ill. Laws 1867-71 (codified as amended at ILL. REV. STAT. ch. 121 1/2, para. 261 (Supp. 1991)) wherein the term "consumer" is defined as a person who purchases merchandise for personal or household use. 510 A.2d at 1201-02.

341. 510 A.2d at 1204.

342. 515 A.2d 246 (N.J. Super. Ct. 1986).

343. *Id.* at 248.

344. 399 A.2d 1047 (N.J. Super. Ct. 1979).

345. *Id.*

346. *Id.* at 1050.

tained from its use, but not damages for pain and suffering or loss of consortium.<sup>347</sup>

In the context of preemption issues, the courts have been guided by considerations of potential conflicts between interpretations and enforcement of the Consumer Fraud Act and the operation of other regulatory statutes. In *Daaleman v. Elizabethtown Gas Company*,<sup>348</sup> the supreme court determined that a private utility's monthly billing practices did not constitute selling or advertising practices within the meaning of the Consumer Fraud Act.<sup>349</sup> However, the court then went on to discuss further reasons for holding the Act inapplicable to the gas company. First of all, determining the legality of the billing practice at issue required interpretation of the state Public Utility Commission (PUC) administrative order and regulations, and remedies for practices in contravention of such order and regulations were available through the PUC.<sup>350</sup> Secondly, if the utility were subject to the Consumer Fraud Act, it thereby also would be subject to administrative regulations promulgated thereunder, with a potential for conflict between such regulations and those issued by the PUC.<sup>351</sup> Thirdly, the court noted that the potential for a punitive treble damages award against the utility under the Consumer Fraud Act would be adverse to the public interest, since the consumers would ultimately bear the cost of the award through increased charges.<sup>352</sup> Likewise, the *Westervelt v. Gateway Financial Service*<sup>353</sup> court found that a secondary mortgage transaction was more like a security transaction than a sale of an interest in real estate, and so found the Consumer Fraud Act inapplicable.<sup>354</sup> However, the court went on to discuss potential conflicts between overlapping application of the Consumer Fraud Act and the Secondary Mortgage Loan Act,<sup>355</sup>

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347. *Id.* at 1051.

348. 390 A.2d 566 (N.J. Super. Ct. 1978).

349. *Id.* at 568-69.

350. *Id.* at 569.

351. *Id.*

352. *Id.*

353. 464 A.2d 1203 (N.J. Super. Ct. 1983).

354. *Id.* at 1208-09.

355. 1970 N.J. Laws ch. 205, §§ 1-30 (codified as amended at N.J. REV. STAT. § 17:11A-34 to 17:11A-63 (Supp. 1991)).

which was directly applicable to the subject transaction.<sup>356</sup> The superior court noted that the remedies available under the two statutes were quite different, and that the statutes authorized adoption of potentially conflicting administrative remedies by different state officers.<sup>357</sup>

In a claim involving allegations of securities fraud, a federal district court acknowledged that the Consumer Fraud Act's definition of "merchandise" was, on its face, broad enough to include securities transactions.<sup>358</sup> However, the court found legislative intent for such inclusion lacking because of an earlier, unsuccessful attempt to amend the statute to specifically include "securities" in that definition.<sup>359</sup> The court also found that the existence of registration, regulation and penalty provisions relating to securities under the New Jersey Uniform Securities Law<sup>360</sup> provided a second basis for its conclusion. The Uniform Securities Act contains strict limits on private causes of action and evinces a different policy of protection than the consumer law, therefore the court found that application of the Consumer Fraud Act to securities transactions would be contrary to legislative intent.<sup>361</sup> Similarly, application of the Consumer Fraud Act in an action against an insurer for wrongful withholding of benefits was denied in *Pierzga v. Ohio Casualty Group of Insurance*.<sup>362</sup> The existence of specific and extensive regulation of the insurance industry and the conflict between the remedies available to consumers under the Consumer Fraud Act and the various statutes relating directly to insurance practices provided the court with a basis for its holding.<sup>363</sup>

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356. 464 A.2d at 1208-09.

357. *Id.* at 1208.

358. *In re Catanella*, 583 F. Supp. 1388 (D. Pa. 1984).

359. *Id.* at 1442. The court looked to the opinion of the *Neueroski* case, wherein that court had considered the applicability of the Consumer Fraud Act to real estate transactions in context of the same unsuccessful amendment (which would have added both "real estate" and "securities" to the definition of "merchandise"), and then noted that the legislature had later amended the act to include "real estate," but had still failed to include "securities" in the definition. *Id.* at 1442-43. See also *supra* notes 321-23 and accompanying text.

360. 1967 N.J. Laws ch. 93, § 1-30 (codified as amended at N.J. REV. STAT. § 49:3-52 to 49:3-76 (Supp. 1991)).

361. 583 F. Supp. at 1443.

362. 504 A.2d 1200 (N.J. Super. Ct. 1986).

363. *Id.* at 1204.

By way of contrast, the courts have deemed the Consumer Fraud Act applicable in some situations where there exists overlapping specific regulation. In the *Arroyo* case discussed *supra*, the court rejected reasoning from the earlier *Neveroski* case, which had differentiated real estate brokers from ordinary commercial sellers because of their being "subject to testing, licensing, regulations and penalties through other legislative provisions."<sup>364</sup> The court in *49 Prospect Street v. Sheva Gardens*<sup>365</sup> rejected the contention that the Consumer Fraud Act should not apply in the context of landlord-tenant relationships because of "the myriad of legislation" specifically dealing with that relationship.<sup>366</sup> That court noted that the Consumer Fraud Act specifically provided for its cumulation with other legal or equitable relief, and that application of the Consumer Fraud Act did not conflict with the various special statutes on the subject.<sup>367</sup>

Courts applying the New Jersey Act have looked to the common meanings of the words used within the act in interpreting the definitional sections and have looked to the actions of the legislature regarding proposals to amend the Act, both successful and unsuccessful, in determining the intended reach of the legislation. The legislature's attempts to expand the definitional sections have been given effect by the courts only where the message was clear and comported with a common sense reading of the Act. With regard to the act's applicability in conjunction with other regulatory laws, the courts have been quite attentive to the analysis of the potential conflicts arising from dual regulation, and thus have been cautious in finding a legislative intent to expand the act's coverage in this respect. These courts have clearly tried to focus on the legislature's intent in trying to interpret and apply the law.

#### E. North Carolina

In 1969, the North Carolina legislature adopted unfair trade practices legislation modeled after the FTC Act.<sup>368</sup> The

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364. 502 A.2d 106, 108 (N.J. Super. Ct. 1985) (citing *Neveroski v. Blair*, 358 A.2d 473, 480 (N.J. Super. Ct. 1976)).

365. 547 A.2d 1134 (N.J. Super. Ct. 1988).

366. *Id.* at 1143.

367. *Id.*

368. 1969 N.C. Sess. Laws ch. 833, (codified as amended at N.C. GEN. STAT.

Act was adopted as an amendment to the state's existing general antitrust laws section.<sup>369</sup> Section 75-1.1 (a) added the provision that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."<sup>370</sup> Subsection (b) of that section announced its purpose was to maintain ethical standards of dealing between persons engaged in business and between persons engaged in business and the consuming public in order to promote good faith and fair dealing between buyers and sellers.<sup>371</sup> The private remedy section, allowing for treble damages and previously available to persons, firms or corporations whose business was "broken up, destroyed or injured,"<sup>372</sup> was broadened by the amendment to include "any person [who] shall be injured" by violations of the chapter.<sup>373</sup>

The only major amendment to the consumer protection legislation occurred in 1977,<sup>374</sup> in response to a narrowing construction of the act by the North Carolina Supreme Court in *State ex rel. Edmisten v. J.C. Penney Co.*<sup>375</sup> That case addressed the applicability of the Act to the debt collection practices of a department store. The court concluded that the modification of FTC Act language by the inclusion of the narrower term "trade" in addition to the broader term "commerce" evinced an intent to limit the scope of the act's prohibition to unfair and deceptive acts and practices involved in the bargain, sale, barter, exchange or traffic.<sup>376</sup> Thereafter, the General

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§§ 75-1.1 to 75-56 (Supp. 1991)).

369. *Id.*, see generally N.C. GEN. STAT. ch 75 (1988 & Supp. 1991).

370. 1969 N.C. Sess. Laws ch. 833 (codified as amended at N.C. GEN. STAT. §§ 76-1.1 to 75-56 (1988 & Supp. 1991)). See William B. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. L. REV. 199, 246-47 (1972).

371. 1969 N.C. Sess. Laws ch. 833 § 1.1(b) (codified as amended at N.C. GEN. STAT. § 75-1.1(b) (1988)).

372. 1913 N.C. Sess. Laws ch. 41, § 14 (codified as amended at N.C. GEN. STAT. § 75-16 (1988)).

373. 1969 N.C. Sess. Laws ch. 833 (codified as amended at N.C. GEN. STAT. § 75-16 (1988)); see Stephen M. Thomas, Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C. L. REV. 896, 900 (1970).

374. 1977 N.C. Sess. Laws ch. 747 (codified as amended at N.C. GEN. STAT. § 75-1.1 to -56 (1988 & Supp. 1991)).

375. 233 S.E.2d 895 (N.C. 1977).

376. *Id.* at 899. The court also looked at the language of the existing section

Assembly enacted the Consumer Protection Act of 1977<sup>377</sup> to affect four changes in the law.<sup>378</sup> The first major change was the rewriting of the language of section 75-1.1(a) to delete the reference to "trade" and conform exactly to the language of section 5 of the FTC Act.<sup>379</sup> Secondly, subsection (b) was entirely rewritten to broadly define "commerce" to include "all business activities, however denominated," but also added a new exemption by expressly excluding from the definition of "commerce" "professional services rendered by a member of a learned profession."<sup>380</sup> A provision was added allowing for the imposition of civil penalties in unfair trade practices suits brought by the attorney general.<sup>381</sup> Finally, sections were added specifically prohibiting certain debt collection activities and providing specific remedies for violations thereof.<sup>382</sup> Although the amendment of 1977 brought the North Carolina statute into complete conformity with the language of the FTC Act, it is not clear whether the legislature thereby intended to incorporate FTC precedent into the state law jurisprudence. An earlier version of the legislation had included a provision that courts applying the legislation should be guided by FTC Act jurisprudence, but that provision was eliminated in the final version of the act.<sup>383</sup>

The North Carolina legislature also has adopted related legislation prohibiting specific business practices and declaring

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75-1.1(b) concerning good faith and fair dealings between "buyers and sellers" and concluded that use of those terms also evidenced an intent to regulate only the activities surrounding a "sale." *Id.*

377. 1977 N.C. Sess. Laws ch. 747 (codified as amended at N.C. GEN. STAT. § 75-1.1 to 56 (1988 & Supp. 1991)).

378. See Susan W. Mason, Comment, *Trade Regulation—The North Carolina Consumer Protection Act of 1977*, 56 N.C. L. REV. 547, 548 (1978).

379. *Id.* The language of both acts now reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1988); N.C. GEN. STAT. § 75-1.1(a) (1988).

380. 1977 N.C. Sess. Laws ch. 747, §§ 1-2 (codified at N.C. GEN. STAT. § 75-1.1(b) (1988)).

381. 1977 N.C. Sess. Laws ch. 747, § 3 (codified as amended at N.C. GEN. STAT. § 75-15.2 (1988)).

382. 1977 N.C. Sess. Laws ch. 747, § 4 (codified as amended at N.C. GEN. STAT. § 75-50 to 56 (Supp. 1991)).

383. See Mason, *supra* note 378, at 550-51 & n.30 (citing § 3 of H. 1050, N.C. Gen. Assembly, 1977 Sess. (2d ed. June 3, 1977)).

violation of such statutes to constitute a violation of section 75-1.1.<sup>384</sup>

Courts applying the North Carolina law, even in its original form, have consistently recognized its applicability within wholly commercial settings. The contention that the first version of the Act applied only to dealings between buyers and sellers, and therefore did not give rise to a cognizable claim for false and deceptive practices between competitors, was rejected by the appellate court in *Harrington Manufacturing Co. v. Powell Manufacturing Co.*<sup>385</sup> The district court in *United Roasters, Inc. v. Colgate-Palmolive Co.*,<sup>386</sup> declared that the plain wording of the statute rendered it applicable to a bulk sale of business assets between corporations as much as to a consumer sale.<sup>387</sup> The Act applies to relationships between business entities even outside of anti-competitive activities where there is some relationship to a sale.<sup>388</sup> The North Carolina Supreme Court in *Johnson v. Phoenix Mutual Life Insurance*<sup>389</sup> determined that the relationship between borrower and mortgage broker and related activities are contemplated by the concept of "trade or commerce." Since the broker is selling a service of procuring a loan and the borrower is buying such a service, there is an exchange of value even though no tangible property moves through commerce.<sup>390</sup>

Under the amended Act, the law's coverage of relationships between commercial entities remains clear. In *Olivetti Corp. v. Ames Business Systems* the court examined the new language of the Act and determined that it did encompass the distributor-dealer relationship at issue.<sup>391</sup> Obviously, the dis-

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384. See Aycock, *supra* note 370, at 212-13 nn.44 & 50-51 (citing, *inter alia*, Retail Installment Sales Act, 1971 N.C. Sess. Laws ch. 796, § 1 (codified as amended at N.C. GEN. STAT. § 25A-44 (1986)), 1979 N.C. Sess. Laws ch. 705, § 1 (codified as amended at N.C. GEN. STAT. § 66-106 to 112 (1985) (regarding unfair practices of loan brokers), 1979 N.C. Sess. Laws ch. 833, § 1 (codified at N.C. GEN. STAT. § 66-118 to 125 (1985) (pertains to health spas, dance studios, and similar businesses))).

385. 248 S.E.2d 739, 741-42 (N.C. Ct. App. 1978).

386. 485 F. Supp. 1041 (E.D.N.C. 1979).

387. *Id.* at 1046.

388. *Id.* at 1046-47; see also *Kent v. Humphries*, 275 S.E.2d 176, 183 (N.C. Ct. App. 1981) (applicable to renting of commercial property).

389. 266 S.E.2d 610 (N.C. 1980).

390. *Id.*

391. 344 S.E.2d 82 (N.C. Ct. App. 1986).

tribution of products to a dealer occurs "in commerce."<sup>392</sup> Also, the private remedy section of the act provides for an action by a person, firm or corporation for injury to a business, clearly extending protection beyond individual consumers.<sup>393</sup>

The courts also have found the business of renting and selling property to be within the contemplation of both versions of the Act. In *Love v. Pressley*,<sup>394</sup> wherein tenants complained of an unlawful eviction and consequential loss of personal property, the appeals court concluded that a lease, as a sale of an interest in real estate, brought the rental of a residential dwelling within the ambit of "trade or commerce."<sup>395</sup> The court cited with approval the analysis of another state court interpreting an identical statute: "The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations."<sup>396</sup> Likewise, the rental of spaces in a mobile home park was deemed "trade or commerce"<sup>397</sup> in *Marshall v. Miller*.<sup>398</sup> Looking at a commercial rental situation, the appellate court in *Kent v. Humphries*<sup>399</sup> concluded that if the rental of residential real estate was covered by the Act, then the rental of commercial property is within the statutory reach of conduct "in or affecting commerce."<sup>400</sup>

However, the courts' application of the Act to transactions in real estate has depended upon some involvement by the defendant in trade or commerce. Regarding an attempted sale of his personally-owned house by an individual who was otherwise in the business of buying and selling real estate, the appellate court in *Wilder v. Squires*<sup>401</sup> found the transaction sufficiently

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392. *Id.* at 94-95.

393. *Id.*

394. 239 S.E.2d 574 (N.C. Ct. App. 1977).

395. *Id.* at 583.

396. *Id.* (quoting *Commonwealth v. Monumental Properties*, 329 A.2d 812, 820 (Pa. 1974)).

397. *Id.* at 102.

398. 268 S.E.2d 97 (N.C. Ct. App. 1980).

399. 275 S.E.2d 176 (N.C. Ct. App. 1981).

400. *Id.* at 183.

401. 315 S.E.2d 63 (N.C. Ct. App. 1984).



"in or affecting commerce" to apply the act.<sup>402</sup> Similarly, the court in *Adams v. Moore*<sup>403</sup> declared that the Act would be applicable to the acquisition of a private individual's home where it is shown that the purchaser bought and sold houses as a business.<sup>404</sup> On the other hand, the appellate court in *Robertson v. Boyd*<sup>405</sup> refused to apply the Act to claims arising from alleged misrepresentations about termite damage involved in the sale of a private residence by individuals not otherwise involved in real estate transactions.<sup>406</sup>

The courts have generally looked at the intent and extent of other overlapping statutory regulation in making determinations as to whether the Unfair Trade Practices Act offers a cumulative or alternative cause of action for conduct falling under more specialized regulation. In *Ray v. United Family Life Insurance Co.*,<sup>407</sup> wherein a former burial insurance agent challenged the insurance company's termination of his agency, the court examined the state insurance statute for evidence of preemptive intent.<sup>408</sup> Reading that statute in conjunction with related federal legislation,<sup>409</sup> the court determined that the North Carolina legislature intended to avoid federal anti-trust regulation of the state insurance business, but not to make that law the exclusive state remedy for unfair trade practices by insurers.<sup>410</sup> That conclusion was augmented by the

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402. *Id.* at 66.

403. 385 S.E.2d 799 (N.C. Ct. App. 1989).

404. *Id.* at 800.

405. 363 S.E.2d 672 (N.C. Ct. App. 1988), noted in *Bhatti v. Buckland*, 400 S.E.2d 440, 442-43 (N.C. 1991) ("Assuming that a 'homeowner's exception' exists, its application is limited to an individual involved in the sale of his or her own residence."). 400 S.E.2d at 442-43.

406. 363 S.E.2d at 676.

407. 430 F. Supp. 1353 (W.D.N.C. 1977).

408. *Id.* at 1356. The statute reads:

Declaration of Purpose.—The purpose of this Act is to regulate trade practices in the *business of insurance* in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), *by defining, or providing for the determination of, all such practices* in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

1949 N.C. Sess. Laws ch. 1112 (codified at N.C. GEN. STAT. § 58-63-1 (1991) (emphasis added)).

409. 15 U.S.C. § 1012(b) (1988). This law "makes the federal antitrust laws applicable to the business of insurance to the extent that such business is not regulated by State law." 430 F. Supp. at 1356.

410. 430 F. Supp. at 1356; accord *Phillips v. Integon Corp.*, 319 S.E.2d 673,

declaration elsewhere in the insurance law that "[t]he powers vested in the Commissioner by this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices herein declared to be unfair or deceptive."<sup>411</sup>

Asked to apply the Unfair Trade Practices Act to the conduct of transactions in commodities futures, the appellate court in *Bache Halsey Stuart, Inc. v. Hunsucker*<sup>412</sup> found such activity to be exclusively subject to regulation under the Commodity Exchange Act.<sup>413</sup> The court considered the pervasive federal regulatory scheme, the required administrative procedure under that Act, and the potential for state unfair trade practices remedies to intrude extensively on the federal scheme, and concluded that the state law must be inapplicable to commodities futures trading.<sup>414</sup> The federal appeals court reached a similar conclusion with regard to securities transactions in *Lindner v. Durham Hosiery Mills*.<sup>415</sup> Again, the pervasive and intricate regulation of securities transactions under specialized state and federal laws,<sup>416</sup> together with the potential for enforcement conflicts between those regulatory schemes and the unfair trade practices legislation, led the court to deem the latter Act inapplicable to securities.<sup>417</sup>

The appellate court in *United Virginia Bank v. Air-Lift Associates*<sup>418</sup> rejected an assertion that the Uniform Commercial Code (UCC) precludes simultaneous application of the Unfair Trade Practices Act to conduct within the reach of UCC regulation.<sup>419</sup> The court noted that the UCC was designed to clarify and update commercial law, and not specifically to deal

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675 (N.C. Ct. App. 1984).

411. 430 F. Supp at 1356 (quoting 1949 N.C. Sess. Laws ch. 1112 (codified at N.C. GEN. STAT. § 58-63.55 (1991))).

412. 248 S.E.2d 567, 570 (N.C. Ct. App. 1978).

413. 7 U.S.C. 1-26 (1988).

414. 248 S.E.2d at 570-71.

415. 761 F.2d 162 (4th Cir. 1985).

416. North Carolina Securities Act, 1925 N.C. Sess. Laws ch. 190 (codified as amended at N.C. GEN. STAT. § 78A-1 to -65 (Supp. 1991)), and Securities Exchange Act of 1934, 15 U.S.C. § 78a to 11 (1988).

417. 761 F.2d at 167-68. The court also relied heavily on the fact that neither FTC Act jurisprudence nor other state unfair trade practices act jurisprudence had applied such legislation in context of securities transactions. *Id.* at 166-67.

418. 339 S.E.2d 90 (N.C. Ct. App. 1986).

419. *Id.* at 93.

with unethical or oppressive trade practices.<sup>420</sup> In contrast, the Unfair Trade Practices Act was developed to require ethical standards of conduct in business transactions at all levels of commerce.<sup>421</sup> To hold the Unfair Trade Practices Act inapplicable to all commercial transactions subject to the provisions of the UCC would render that Act essentially superfluous.<sup>422</sup>

Finally, although a state appellate court in *Buie v. Daniel International*,<sup>423</sup> cursorily held that the Act is inapplicable to employment practices, which fall within the purview of other statutes adopted for that express purpose, a more recent state supreme court decision calls that conclusion into question. In *United Laboratories v. Kuykendall*,<sup>424</sup> involving alleged violations of a non-competition agreement and tortious interference with contract by an employer against a former employee and his new employer, the North Carolina Supreme Court declined to deem the Unfair Trade Practices Act totally inapplicable to such situations.<sup>425</sup>

North Carolina offers another example of strong legislative direction for broad application of the consumer protection statute. The changes affected by the major amendment of 1977 assert the broadest possible scope for its coverage, as exemplified by the expansive definition given the term "commerce." Additionally, the legislature has specifically declared in various subsequently enacted laws that the consumer protection law and remedies thereunder are coextensive with the remedies available under the more specific law. Despite this direction, the courts have been careful to study the effects of applying the statute to activities otherwise regulated before recognizing a claim under the consumer protection law. They have declined to recognize such claims where there would be unnecessary intrusion upon a comprehensive regulatory scheme,

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420. *Id.*

421. *Id.*

422. *Id.*

423. 289 S.E.2d 118, 119-20 (N.C. Ct. App. 1982); accord *American Marble Corp. v. Crawford*, 351 S.E.2d 848 (N.C. Ct. App. 1987).

424. 370 S.E.2d 375 (N.C. 1988).

425. *Id.* at 389. The court found that there was an inadequate record to determine whether or not there was sufficient evidence to support the claims made under § 75- 1.1, and remanded the case for a new trial on issues related to the Unfair Trade Practices Act. *Id.*

though they have recognized coextensive application of the law where no conflict is thereby created.

#### F. *Pennsylvania*

Pennsylvania adopted its Unfair Trade Practices and Consumer Protection Law in 1968.<sup>426</sup> The original Act prohibited "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce,"<sup>427</sup> and provided a list of twelve specific unfair or deceptive practices, followed by a catch-all prohibition against "engaging in any other fraudulent conduct which creates likelihood of confusion or of misunderstanding."<sup>428</sup> Trade and commerce were defined to mean the "advertising, offering for sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate and includes any trade or commerce directly or indirectly affecting the people of this commonwealth."<sup>429</sup> Enforcement authority lay with the Attorney General's office.<sup>430</sup> In 1976, the Act was amended to include some additional specifically defined unfair or deceptive practices,<sup>431</sup> and to grant a private right of action to persons who purchase or lease goods primarily for person, family or household purposes and thereby suffer loss of money or property.<sup>432</sup>

In a challenge to the validity of debt collection regulations issued under the Act by the Pennsylvania Bureau of Consumer Protection, the court affirmed that debt collection activities are within the reach of the unfair trade practices legislation.<sup>433</sup> Although the Act's definition of "trade and commerce" does

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426. Unfair Trade Practices and Consumer Protections Law, 1968 Pa. Laws 1224, No. 387, §§ 1-9 (codified as amended at PA. STAT. ANN. tit. 73, §§ 201-1 to 201-9 (Supp. 1991)).

427. *Id.* at § 201-2(4).

428. *Id.*

429. *Id.* at § 201-2(3).

430. *Id.* at § 201-4.

431. Act of Nov. 24, 1976 Pa. Laws 1166, No. 260, § 1 (codified at PA. STAT. ANN. tit. 73, §§ 201-2(4)(xiii) to (xvi) (1971 & Supp. 1991)).

432. Act of Dec. 17, 1976 Pa. Laws 1166, No. 260, § 1 (as affected 1978 Pa. Laws 202, No. 53, § 2(a)[1433]) (codified as amended at PA. STAT. ANN. tit. 73, § 201-9.2 (1971 & Supp. 1991)).

433. *Pennsylvania Retailers' Assn. v. Lazin*, 426 A.2d 712, 717-18 (1981).

not specifically include debt collection, that concept is subsumed within the concept of "a sale or distribution of . . . services or property . . . and any other article, commodity, or thing of value," since no debt could accrue until there was a "sale or distribution."<sup>434</sup> Also, the FTC Act, after which the state law was modeled, has been interpreted as authorizing the FTC to regulate debt collection activities.<sup>435</sup>

This issue has been addressed extensively by the bankruptcy courts in the context of debtors' adversary proceedings challenging practices of lenders in relevant underlying loan transactions. *Russell v. Fidelity Consumer Discount Co.*,<sup>436</sup> involved an adversary proceeding by a Chapter 13 debtor based upon, *inter alia*, an alleged violation of the Unfair Trade Practices Act in lender's charging of a hidden broker's commission as part of a consumer loan transaction.<sup>437</sup> In response to the lender's assertion that the unfair trade practices legislation did not cover the lending of money, the court undertook an overall analysis of Pennsylvania consumer protection legislation. The court noted the existence of several state regulatory schemes dealing specifically with the lending of money, but which failed to grant a private right of action for injured consumers.<sup>438</sup> It judged the legislature's 1976 amendment of the Unfair Trade Practices Act, providing a private cause of action for consumers, to evidence an intent to cure that defect in the earlier legislation by permitting a private action under the catch-all category of the Unfair Trade Practices Act for any substantial violation of the other consumer protection statutes.<sup>439</sup> As further support for this proposition, the court cited earlier unfair trade practices cases holding the Act applicable to business transactions<sup>440</sup> and insurance transac-

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434. *Id.* at 718.

435. *Id.*

436. 72 B.R. 855 (Bankr. E.D. Pa. 1987).

437. *Id.*

438. *Id.* at 871 (citing the Small Loan Act, 1915 Pa. Laws 1012 (repealed 1976); Consumer Discount Company Act, 1937 Pa. Laws 262 (codified at PA. STAT. ANN. tit. 7, §§ 6201-6219 (1967 & Supp. 1991)); Motor Vehicle Sales Finance Act, 1947 Pa. Laws 1110 (codified at PA. STAT. ANN. tit. 69, §§ 601-637 (1967 & Supp. 1991)); Home Improvement Finance Act, 1963 Pa. Laws 1082, art. I (codified at PA. STAT. ANN. tit. 73 §§ 500-101 to 500-502 (1971 & Supp. 1991)); Goods and Services Installment Sales Act, 1966 Pa. Laws 55, art. I (codified at PA. STAT. ANN. tit. 69, §§ 1101-2303 (Supp. 1991))).

439. 72 B.R. at 871.

440. *Id.* (citing *Commonwealth v. Tolleson*, 321 A.2d 664, 692-93 (Pa. Commw.

tions,<sup>441</sup> and recognizing concurrent causes of action under the Act and FTC regulation,<sup>442</sup> and the federal Truth in Lending Act.<sup>443</sup> The court finally noted that other states with similar statutes had consistently applied those statutes to loan transactions.<sup>444</sup> Furthermore, in adversarial proceedings based upon allegations of unfairness in a business loan transaction the court found in *Jungkurth v. Eastern Financial Services*,<sup>445</sup> that the Unfair Trade Practices Act is generally applicable, even though the private remedy section of the statute is limited to actions based upon transactions for personal, family or household purposes.<sup>446</sup> Also, the *Wernly v. Anapol*<sup>447</sup> court applied the Act to afford debtor recourse for an excessive fee charged by a check cashing company,<sup>448</sup> and the *Milbourne v. Mid-Penn Consumer Discount Co.*<sup>449</sup> court applied the Act to a creditor's repeated refinancing of a consumer loan on less favorable terms for the consumer.<sup>450</sup>

*Andrews v. Fleet Real Estate Funding Corp.*<sup>451</sup> dealt with the issue of whether a mortgage loan transaction constitutes a "purchase of goods or services" under the Unfair Trade Practices Act.<sup>452</sup> The court cited its analysis in *Russell* wherein the Act was deemed applicable to the acts of a mortgagee in a consumer loan transaction, and concluded that "the business of mortgage lenders is the sale of a service," and was thus within the purview of the Act.<sup>453</sup> In *Smith v. Commercial Banking Corp.*<sup>454</sup> the federal appeals court came to the same conclu-

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Ct. 1974)).

441. *Id.* (citing *Layton v. Libery Mutual Fire Ins. Co.*, 530 F. Supp. 285 (E.D. Pa. 1981), and *Culbreth v. Lawrence J. Miller, Inc.*, 477 A.2d 491 (Pa. Super. Ct. 1984)).

442. *Id.* (citing *Iron & Glass Bank v. Framz*, 9 Pa. D. & C.3d 419 (Alleg. Co. C.P. 1978)).

443. *Id.* (citing *Commonwealth v. Nickel*, 26 Pa. D. & C.3d 115 (Mercer Co. C.P. 1983)).

444. 72 B.R. 855, 871 (Bankr. E.D. Pa. 1987).

445. 74 B.R. 323 (Bankr. E.D. Pa. 1987).

446. *Id.* at 334-35.

447. 91 B.R. 702 (Bankr. E.D. Pa. 1988).

448. *Id.*

449. 108 B.R. 522 (Bankr. E.D. Pa. 1089).

450. *Id.*

451. 78 B.R. 78 (Bankr. E.D. Pa. 1987).

452. *Id.* at 81-82.

453. *Id.* at 82.

454. 866 F.2d 576 (3d Cir. 1989).

sion by determining that mortgage transactions constitute "trade and commerce" within that definitional section of the act since there is an exchange of value between a loan broker and a borrower.<sup>455</sup> The court further held that the language of the Act's private remedy section of the act broadly provides for a cause of action based on the conduct of the mortgagor throughout the life of the loan, not merely relating to the making of the initial mortgage agreement.<sup>456</sup>

Under similar analysis of the definition of "trade and commerce" under the Act, the court in *Preate v. Watson & Hughey Co.*<sup>457</sup> found the law applicable to charitable solicitations.<sup>458</sup> The court found that the solicitations clearly involved "advertising" of some "thing of value."<sup>459</sup> That court also had to address the issue of whether the Unfair Trade Practices Act remained applicable along with the more specific regulation found in the state Charitable Organization Reform Act.<sup>460</sup> In light of an earlier case applying the Unfair Trade Practices Act to such solicitations,<sup>461</sup> and several other earlier cases applying the Act to conduct governed also by other statutes,<sup>462</sup> the court upheld the overlapping coverage.<sup>463</sup>

Courts asked to apply the Act's private action section have been much less expansive in their reading of the phrase "purchases or leases goods or services." In *Bonacci v. Save Our Unborn Lives*,<sup>464</sup> the court voiced a requirement that such a private right of action be based on an actual purchase or lease,

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455. *Id.* at 581-82. The court cited the language of the North Carolina court in *Johnson v. Phoenix Mut. Life Ins.*, 266 S.E.2d 610 (N.C. 1980). See *supra* text accompanying notes 389-90. The court did not mention the earlier state court decision holding the consumer law inapplicable to a private action based on a mortgage loan transaction. See *Epstein v. Goldowe FSB*, *infra* note 468 and accompanying text.

456. 866 F.2d at 583 (3d Cir. 1989).

457. 563 A.2d 1276 (Pa. Commw. Ct. 1989).

458. *Id.* at 1282.

459. *Id.*

460. Charitable Organization Reform Act, 1986 Pa. Laws 107, No. 36 (repealed 1990) (for subject matter of the repealed act, see Solicitation of Funds for Charitable Purposes Act, 1990 Pa. Laws 1200, No. 202, §§ 162.1 to 162.24 (codified at PA. STAT. ANN. tit. 10, § 162.1 to 162.24 (Supp. 1991))).

461. *Commonwealth v. Society of the 28th Div.*, 538 A.2d 76 (Pa. Commw. Ct. 1988).

462. See *infra* notes 481-82, 491-97 and accompanying text.

463. 563 A.2d at 1283 (Pa. Commw. Ct. 1989).

464. 11 Pa. D. & C. 3d 259 (1979).

and not upon an attempt to enter into a bargain or exchange.<sup>465</sup> In that case a "Right to Life" organization billing itself as an abortion, birth control and pregnancy testing clinic, contacted a caller's family and priest about her pregnancy and attempt to procure an abortion, contrary to the caller's wishes.<sup>466</sup> In denying plaintiff's claim, the court noted that it made no decision as to the merits of a potential violation of the Act if prosecuted by the Attorney General.<sup>467</sup> Similarly, the *Epstein v. Goldome FSB*<sup>468</sup> court held that a mortgage loan was not a "purchase or lease of goods or services," but instead merely a borrowing of currency to finance the acquisition of a residential building.<sup>469</sup>

The Pennsylvania Supreme Court undertook an extensive analysis of the Act in determining its applicability to the leasing of residential property in *Commonwealth v. Monumental Properties*.<sup>470</sup> In reaching its conclusion that the Act should be liberally construed, the court noted the expansive language of the Act and the legislative purpose to prevent fraud and adjust the bargaining power of opposing forces in the marketplace.<sup>471</sup> The court also recognized that the state Act was modeled upon the FTC Act and the Lanham Trademark Act, and decreed that it is appropriate to look to FTC and Lanham Trademark Act jurisprudence for guidance in interpreting and applying the state law.<sup>472</sup> It then reviewed FTC Act jurisprudence and found strong support for the concept of applying consumer protection law to leases.<sup>473</sup> In addressing

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465. *Id.* at 262.

466. *Id.* at 259.

467. *Id.* at 262. Enforcement authority of the Attorney General is not limited as is enforcement authority under the private right of action. See *supra* notes 430-32 and accompanying text.

468. 49 Pa. D. & C. 3d 551 (1987).

469. *Id.* at 557-58. Note that the outcome of this decision is contrary to that of the Third Circuit in *Smith v. Commerical Banking Corp.*, *supra* notes 454-56 and accompanying text.

470. 329 A.2d 812 (Pa. 1974)

471. *Id.* at 815-16.

472. *Id.* at 817-18.

473. *Id.* at 819-20. In addition to noting the deliberately broad and flexible definition of the FTC Act's reach, the court noted several judicial and administrative proceedings relating to conduct surrounding commercial and residential leases and to the sale of land. *Id.* at 819. The court also noted that FTC Act jurisprudence required no passage of title in a "sale" to trigger its applicability. *Id.* at 823.



defendant's argument that leasing is not included in the state statute's definition of "trade and commerce," the court refused to end its inquiry on the exclusion versus inclusion of the specific term.<sup>474</sup> Instead, the court took a functional view of a modern residential tenant as a consumer of a bundle of goods and services purchased from a landlord via periodic rental payments.<sup>475</sup> It buttressed this interpretation with examples of common law authority for the proposition that the lease of property is actually the sale and purchase of an interest in real estate for a period of time.<sup>476</sup> Finally, the court took judicial notice of the crisis in availability of suitable housing as a backdrop for the legislature's actions in passing the consumer protection law and concluded that failure to recognize protection for tenants under that law would strain the purposes and character of the law.<sup>477</sup>

Asked to determine the applicability of the act to the sale of a residence, the *Gabriel v. O'Hara*<sup>478</sup> superior court found the answer directly within the statutory language.<sup>479</sup> Since the terms "trade and commerce" include "the . . . sale . . . of any . . . property, tangible or intangible, *real*, personal or mixed" the court refused to consider arguments to the contrary.<sup>480</sup>

In addressing whether the Unfair Trade Practices Act is applicable to the conduct of otherwise-regulated enterprises, the courts have favored application of the Act where it does not threaten conflict with the purposes and processes of the more specific regulatory scheme. In *Safeguard Investment Corp. v. Colville*,<sup>481</sup> the court upheld the applicability of the Act to conduct allegedly in violation of the state usury laws.<sup>482</sup> The

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474. 329 A.2d at 820.

475. *Id.* at 820-21 (citing *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

476. *Id.* at 822-23.

477. *Id.* at 824.

478. 534 A.2d 488 (Pa. Super. Ct. 1987).

479. *Id.* at 492.

480. *Id.* (citing 73 PA. STAT. 201-2(3)) (emphasis added by the court).

481. 404 A.2d 720 (Pa. Commw. Ct. 1979).

482. *Id.* at 721. The conduct complained of occurred over a period of time during which the state usury law was amended. Between 1968 and 1973 the applicable law was Act of May 28, 1858 Pa. Laws 622, § 1 (repealed 1974). That statute served a limited purpose of fixing maximum interest rates and providing limited defenses and recovery for violations. It was amended by Loan Interest and

court noted that the earlier version of the usury statute was not so comprehensive as to preclude other regulation of the lending of money, and the amended version of that statute specifically clarified the legislature's position that the remedies provided thereunder under supplemental to those available under other laws.<sup>483</sup> *Pennsylvania Bankers Ass'n. v. Bureau of Consumer Protection*<sup>484</sup> involved a challenge to the Bureau's promulgation under the Act of regulations affecting debt collection practices by national banks.<sup>485</sup> The court first determined that the state's regulations were not preempted by federal law.<sup>486</sup> Thus, acknowledging that national banks may be subject to both state and federal regulation, the court noted that state regulation is only allowable where there is no interference with the purpose or efficacy of the federal agencies and no conflict exists between the state and federal regulations.<sup>487</sup> In this case, the sanctions for violations of state regulations were so severe that such regulation was found to impair the efficacy of the national banks.<sup>488</sup> Also, because Congress had delegated authority for enforcement of both state and federal statutes and regulations to the Comptroller of the Currency, the state agency was without power to enforce its own regulations.<sup>489</sup> The court did find, however, that no impairments existed for the Bureau's regulation of the debt collection practices of state chartered banks, but left open for further argument the issue of whether the state Department of Banking possessed sole enforcement authority for debt collection regulations.<sup>490</sup>

Private actions under the Unfair Trade Practices Act have been permitted against public adjusters and insurers despite the existence of specific regulations of the conduct of each

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Protection Law, 1974 Pa. Laws 13, No. 6, §§ 101-605 (codified as amended at PA. STAT. ANN. tit. 41, §§ 101-605 (1991)) which was a far more comprehensive act. 404 A.2d at 721 (Pa. Commw. Ct. 1979).

483. 404 A.2d at 721 (Pa. Commw. Ct. 1979).

484. 427 A.2d 730 (Pa. Commw. Ct. 1981).

485. *Id.*

486. *Id.* at 731.

487. *Id.*

488. *Id.* at 731-732.

489. *Id.* at 732 (citing *National State Bank v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980)).

490. *Id.* at 733. There is no reported follow-up on the conclusion reached on this issue.

one's enterprise. *Culbreath v. Lawrence J. Miller, Inc.*<sup>491</sup> recognized the viability of a claim against licensed public adjusters for failure to inform plaintiffs of cancellation rights under the consumer protection law.<sup>492</sup> The superior court found, as a preliminary matter, that the business of a public adjuster is to sell an insured the service of representing the insured in settling a claim with the insurer and thus fell clearly within the definition of "trade and commerce."<sup>493</sup> The court also noted that the consumer protection law made no express exemption for public adjusters.<sup>494</sup> The court then went on to find that the public adjuster law<sup>495</sup> was essentially a licensing statute, not equipped to comprehensively regulate the conduct of public adjusters, and that there was no irreconcilable conflict produced by recognizing specific requirements for public adjuster contracts under the consumer protection law that are not addressed under the public adjuster law.<sup>496</sup> Likewise, in *Pekular v. Eich*<sup>497</sup> the superior court determined that the provisions of the Unfair Insurance Practices Act<sup>498</sup> which empowered the insurance commissioner to investigate and punish certain acts and practices of insurers did not provide the type of comprehensive remedy for insureds that would preclude a private action for damages under the consumer protection law.<sup>499</sup>

Courts applying the Pennsylvania law have given the statutory language its common meaning. They have also been guided to a great extent by the interpretations and applications given other, similar state statutes and the FTC Act. In interpreting the statute, these courts have not pressed beyond the plain meaning of the words used by the legislature. Likewise,

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491. 477 A.2d 491 (Pa. Super. Ct. 1984).

492. *Id.* at 501.

493. *Id.* at 496.

494. *Id.*

495. 1921 Pa. Laws 276, §§ 1-8 (repealed 1983) (for subject matter of repealed sections, see 1983 Pa. Laws 260, No. 72, §§ 1-8 (current version at PA. STAT. ANN. tit. 63, §§ 1601-08 (Supp. 1991))).

496. 477 A.2d at 498-500.

497. 513 A.2d 427 (Pa. Super. Ct. 1986).

498. 1974 Pa. Laws 589, No. 205, § 1 (codified at 40 PA. STAT. §§ 1171.1 to 1171.15 (Supp. 1991)).

499. 513 A.2d at 433-34. Again, as a preliminary matter, the court noted that the function of insurers, to sell an insured a property interest in a policy of insurance, is clearly within the act's comprehension of "trade and commerce." *Id.* at 433.

the courts have not been radical in their application of the act to conduct regulated under other laws. They have generally looked to, and heeded, any available evidence of legislative direction on this point, and have otherwise looked for any potential conflict between the policies and processes of the two regulatory schemes before applying the dual regulation.

### G. *Texas*

The Texas Deceptive Trade Practices-Consumer Protection Act was adopted in 1973.<sup>500</sup> The law specifically provides that it is to be liberally construed and applied to further its announced purpose, "to protect consumers against false, misleading and deceptive business practices, unconscionable practices and breaches of warranty," in an efficient and economic manner.<sup>501</sup> The original enactment broadly prohibited false, misleading or deceptive acts or practices in the conduct of any trade or commerce, and provided a non-exhaustive list of specifically described outlawed conduct.<sup>502</sup> "Trade and commerce" was defined as the "advertising, offering for sale, sale, lease or distribution of any good or service, or any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value."<sup>503</sup> A public enforcement authority was given to the consumer protection division of the state attorney general's office.<sup>504</sup> Consumers were afforded a private right of action for violations of the Act.<sup>505</sup> However, "consumer" was defined as an "individual who seeks or acquires by purchase or lease any goods or services," goods as tangible chattels bought for use, and services as work, labor and services for other than commercial or business use.<sup>506</sup>

These three definition sections in the Texas act were amended in 1975 to effect an expansion of the scope and coverage of the law.<sup>507</sup> The definition of "goods" was expanded

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500. 1973 Tex. Gen. Laws p. 322, ch. 143, § 1 (codified as amended at TEX. BUS. & COM. CODE ANN. §§ 17.41 to 17.826 (West 1987 & Supp. 1992)).

501. *Id.* § 17.44.

502. *Id.* § 17.46.

503. *Id.* § 17.45(b).

504. *Id.* §§ 17.58, 17.60 to 17.62.

505. TEX. BUS. & COM. CODE ANN. § 17.50 (West 1987 & Supp. 1992).

506. *Id.* § 17.45(1)-(2) & (4).

507. *Id.* For discussion of the impact of the amendments see David F. Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28

to include the purchase or lease of real property, and leased services were specifically included in the definition of "services."<sup>508</sup> The change of most impact, however, was the addition of partnerships and corporations to the definition of consumer.<sup>509</sup> The legislature thus evinced a clear intent to extend the protections of the Act to transactions between business persons and to permit businesses to privately enforce the Act.<sup>510</sup>

In 1977, the Act was again amended to expand its scope.<sup>511</sup> The definition of "services" was stripped of the restriction to services "for other than commercial or business use," thus opening up coverage for goods or services for either personal or business use.<sup>512</sup> The definition of "consumer" was expanded to include any governmental entity.<sup>513</sup> Additionally, the legislature added a definition of "unconscionable action or course of action" in place of the definition of merchant, which was deleted altogether.<sup>514</sup> In order to aid defendants, the legislature also added provisions concerning defenses to treble damage liability and the right to seek indemnification against others responsible for the conduct of which the consumer complains.<sup>515</sup>

The Texas legislature undertook more extensive amendment of the Act in 1979, at least partially in response to a lobbying effort claiming that businesses were unfairly burdened by certain provisions of the earlier Act.<sup>516</sup> The Act,

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BAYLOR L. REV. 1 (1976).

508. *Id.*

509. *Id.*

510. See Bragg, *supra* note 507, at 23.

511. TEX. BUS. & COM. CODE ANN. § 17.45 to 17.46 & 17.50 (West 1987 & Supp. 1992). For a discussion of the impact of these amendments see Gaddy Wells, Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525 (1977).

512. TEX. BUS. & COM. CODE ANN. § 17.45(2) (West 1987).

513. *Id.* § 17.45(4).

514. *Id.* § 17.45(5). The added definition is broad in that it seems to cover any acts or practices connected with the underlying transaction and subsequent conduct rather than merely contract terms or clauses defining the transaction; see Wells, *supra* note 511, at 529. The deleted definition of "merchant" as a party to a consumer transaction other than a consumer opens the way for actions by "merchant consumers." Wells, *supra* note 511, at 531-32.

515. TEX. BUS. & COM. CODE ANN. §§ 17.505, 17.55 (West 1987 & Supp. 1992).

516. *Id.* §§ 17.43, 17.45(9), 17.46, 17.50, 17.505, 17.506, 17.56, 17.565. For a

from its inception, had specified that remedies thereunder were cumulative to those available under other laws, but the 1979 legislature added a proviso that no double recovery could be had under this Act and any other law for damages or penalties stemming from the same act or practice.<sup>517</sup> The legislature limited recovery of treble damages over the first one thousand dollars, requiring a showing of scienter for recovery of such punitive damages.<sup>518</sup> Private enforcement under the Act was also limited to actions based upon one of the specifically enumerated false, misleading or deceptive acts or practices from section 17.46(b), through two categories of conduct which were added to that laundry list.<sup>519</sup> However, another change in the language of the private enforcement section, allowing a cause of action for conduct constituting a "producing cause of actual damages" in place of conduct violating the Act which has "adversely affected" the consumer, may have enlarged potential recovery by allowing for recovery of actual but unforeseen damages, including consequential damages and damages for mental anguish.<sup>520</sup> Other changes included a provision explicitly allowing courts to look to relevant decisions of courts of other jurisdictions, in addition to FTC Act jurisprudence, in interpreting and applying the Act,<sup>521</sup> changes relating to notice requirements and offers of settlement,<sup>522</sup> a list of absolute defenses,<sup>523</sup> a limitation on venue,<sup>524</sup> and addition of a statute of limitations.<sup>525</sup>

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discussion of the impact of the 1979 amendments see Robert E. Goodfriend & Michael P. Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW. L.J. 941 (1979); Edmond R. McCarthy, Jr., *An Analysis of the 1979 Texas Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?* 11 ST. MARY'S L.J. 885 (1980).

517. TEX. BUS. & COM. CODE ANN. § 17.45 (West 1987).

518. *Id.* § 17.50(b)(1).

519. *Id.* § 17.46(d), 17.50(a)(1). The activities added to the list of "false, misleading or deceptive acts or practices" concerned distant forum abuse and failure to disclose information material to the consumer's decision to enter into the transaction. *Id.* § 17.46(b)(22)-(23).

520. *Id.* § 17.50(a); see Goodfriend & Lynn, *supra* note 516, at 979-82 (1980).

521. 1973 Tex. Gen. Laws 322, ch. 143, § 1 (codified as amended at TEX. BUS. & COM. CODE ANN. 17.46(c)(2) (West 1987)).

522. TEX. BUS. & COM. CODE ANN. § 17.505 (West 1987 & Supp. 1992).

523. *Id.* § 17.506.

524. *Id.* § 17.56.

525. *Id.* § 17.565.

Since 1978, the only amendment to the Texas act with significant impact on its scope was the limitation of the term "consumer" to expressly exclude business consumers with assets of \$25 million or more, or owned or controlled by an entity with assets of \$25 million or more.<sup>526</sup> A "business consumer" is defined as an individual, partnership or corporation other than the state or subdivision or agency of the state that seeks or acquires goods or services for commercial or business use.<sup>527</sup>

Successive amendments of the Texas legislation have largely expanded its coverage via expansion of definitions of "consumer," "goods" and "services," although protections for defendants also have been added. Courts thus have been given rather clear direction for a liberal construction and application of the Act.<sup>528</sup> Furthermore, the legislature has been fairly direct in its command that the Act's remedies be cumulative to those of other more specific legislation by including a specific and detailed provision to that effect,<sup>529</sup> and by including specific reference to the Act's concurrent coverage of matters regulated under the insurance laws.<sup>530</sup>

Litigation concerning coverage of the Act has focused on the scope of the definitions of "consumer," "goods" and "services." Though the Act does not limit those persons subject to liability under the Act, except by express exemption,<sup>531</sup> there is a limitation on who has standing to bring a private cause of action to "consumers," defined as individuals, partnerships, corporations or state subdivisions or agencies, but excluding business consumers with assets of more than \$25 million, who seek or acquire, by purchase or lease, any goods or services.<sup>532</sup> In analyzing consumer status, the courts have had to

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526. *Id.* § 17.45(4).

527. *Id.* § 17.45(10).

528. *See supra* notes 449-57 and accompanying text; *see also* TEX. BUS. & COM. CODE ANN. § 17.44 (West 1987).

529. TEX. BUS. & COM. CODE ANN. § 17.43 (West 1987).

530. *Id.* § 17.47(a), 17.48(b) & 17.50(a)(4).

531. *Id.* § 17.49. These include the typical exemption for publishers and broadcasters who disseminate materials without knowledge of or gain from the violation of the act, and acts or practices specifically authorized by the FTC. *See Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706 (Tex. 1983).

532. *See* TEX. BUS. & COM. CODE ANN. §§ 17.50, 17.45(4) (West 1987 & Supp. 1992).

address the question of what constitutes a "purchase or lease." Although acknowledging that privity of contract is not necessary to establish consumer status, the federal district court in *Kitchener v. T.C. Trailers*,<sup>533</sup> declined to go so far as to allow the mere borrower of a good to stand as a purchaser in a private action under the act.<sup>534</sup> Likewise, according to the court of appeals in *Rodriguez v. Ed Hicks Imports*,<sup>535</sup> a passenger in an automobile who was neither the purchaser nor the one for whom the car was purchased did not bear a "purchaser" relationship to the underlying transaction.

The issue of "purchaser" status, in certain instances, has become intertwined with the reading given the terms "goods" and "services." Thus, in *Riverside National Bank v. Lewis*,<sup>536</sup> wherein a loan applicant complained of the bank's refusal to honor a loan commitment, the Texas Supreme Court determined that Lewis did not qualify as a consumer since he only sought to borrow money, and money is properly characterized as a currency of exchange rather than a good or service.<sup>537</sup> However, an opposite result was achieved in *Knight v. International Harvester Credit Corp.*<sup>538</sup> involving an extension of credit to finance the purchase of a dump truck.<sup>539</sup> There, the supreme court concluded that the lender who routinely provided financing for sales by the seller was "so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale."<sup>540</sup> The buyer's objective was the purchase of the truck and the financing arrangement merely provided the means of effecting the purchase.<sup>541</sup> The court distinguished the fact pattern of the *Riverside* case as involving only an attempt to borrow money, without a related sale or lease as part of the transaction.<sup>542</sup> *Fleniken v. Longview Bank & Trust Co.*,<sup>543</sup> held that the purchaser of a home could sue the bank

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533. 715 F. Supp. 798 (S.D. Tex. 1988).

534. *Id.* at 801.

535. 767 S.W.2d 187 (Tex. Ct. App. 1989).

536. 603 S.W.2d 169 (Tex. 1980).

537. *Id.* at 174-75.

538. 627 S.W.2d 382 (Tex. 1982).

539. *Id.*

540. *Id.* at 388-89.

541. *Id.* at 389.

542. *Id.*

543. 661 S.W.2d 705 (Tex. 1983).



under the Act for the bank's unconscionable course of conduct in foreclosing on the partially constructed home where the bank had agreed to provide interim financing to the builder in exchange for assignment of the purchasers' note and the mechanic's lien contract.<sup>544</sup> Again, the supreme court considered the financing arrangement to be appurtenant to the buyer's objective of purchasing a home.<sup>545</sup> The case of *Wynn v. Kensington*,<sup>546</sup> however, made it clear that lender liability under the Act in this type of case requires evidence of a "tie-in" relationship between the seller and the lender.<sup>547</sup>

Similarly, one appeals court found in *First State Bank v. Chesshir*<sup>548</sup> that the mere purchase of a certificate of deposit which represents money to be paid in the future, like a loan, did not constitute a purchase of goods or services. That appeals court noted that the Chesshirs had not contended that they sought or acquired any services collateral to the sale of the certificate of deposit.<sup>549</sup> The appeals court in *First Federal Savings & Loan Ass'n. v. Ritenour*<sup>550</sup> seized upon that factor to support a finding of liability of the bank under the Act for misrepresentations made by the bank's employee about withdrawal of the funds held by the bank.<sup>551</sup> The fact that this plaintiff took advantage of the customer services department's financial counseling services collateral to the purchase of the certificate of deposit was deemed sufficient to bring the entire transaction within the purview of the Act.<sup>552</sup>

When dealing with application of the definitions of "goods" and "services," the federal and state courts in Texas

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544. *Id.* at 707; *accord* *Holland Mortgage & Inv. Corp. v. Bone*, 751 S.W.2d 515 (Tex. Ct. App. 1987) (involving the financing of the purchase of a mobile home).

545. 661 S.W.2d at 708.

546. 697 S.W.2d 47 (Tex. Ct. App. 1985).

547. *Id.* at 48. (disallowed claim against the mortgage lender on theories of product liability and deceptive trade practices in connection with allegedly excessive levels of formaldehyde in mobile home where lender was not involved in manufacture or sale of the home).

548. 613 S.W.2d 61 (Tex. Ct. App. 1981).

549. *Id.* at 62 n.3.

550. 704 S.W.2d 895 (Tex. Ct. App. 1986).

551. *Id.* at 898-99; *accord* *Plaza Nat'l Bank v. Walker*, 767 S.W.2d 276 (Tex. Ct. App. 1989) (involving liability for bank's handling of savings accounts under the act because of related routine services).

552. 704 S.W.2d at 900 (Tex. Ct. App. 1986).

have given a literal reading to the words of the statute. The appeals court in *Norwood Builders v. Toler*,<sup>553</sup> asked to apply the Act to a contract for the construction of a new home, succinctly noted that the Act's definition of "goods" had been amended to include "real property purchased or leased for use" and thus covered the transaction.<sup>554</sup> By way of contrast, the court in *Portland Savings & Loan Ass'n. v. Bevil, Bresler & Schulman Government Securities*,<sup>555</sup> held the definition of "goods," including "tangible chattels or real property," did not encompass stocks, which are intangible chattel.<sup>556</sup> The federal appeals court in the later case of *FDIC v. Munn*<sup>557</sup> was asked to apply the Act to alleged misrepresentations made by a bank officer in connection with the financing of a stock purchase on the basis of a "sale" of collateral counseling "services."<sup>558</sup> That court remanded the case for resolution of the question of the Act's applicability and offered guidance for comparing this situation to the *Knight*, *Flenniken*, and *Ritenour* cases by noting that the purchase of goods or services were a primary objective of plaintiff's in the latter cases, whereas in the instant case it was not clear whether Munn merely complained of services incidental to his main objective, obtaining financing for the purchase of intangible chattels, or actually sought to purchase services as an independent objective in the transaction.<sup>559</sup> The *Marshall v. Quinn-L Equities, Inc.*<sup>560</sup> court, examining a complaint by investors in a real estate development limited partnership, found that the related services provided by the general partner in furtherance of the goal of acquiring and operating commercial real estate for profit, were sufficiently important an objective of the investment transaction to be considered a "purchased service."<sup>561</sup> That court declined to find that the partnership interests constituted

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553. 609 S.W.2d 861 (Tex. Civ. App. 1981).

554. *Id.* at 862.

555. 619 S.W.2d 241 (Tex. Civ. App. 1981).

556. *Id.* at 245. *Accord* Swenson v. Engelstad, 626 F.2d 421, 418 (5th Cir. 1980); *Bourland v. State*, 528 S.W.2d 350, 358 (Tex. Civ. App. 1975); *see also* *Allais v. Donaldson, Lufkin & Jenrette*, 532 F. Supp. 749 (S.D. Tex. 1982).

557. 804 F.2d 860 (5th Cir. 1986).

558. *Id.*

559. *Id.* at 864-66.

560. 704 F. Supp. 1384 (N.D. Tex. 1988).

561. *Id.* at 1393-94.

"goods" as representative of an interest in real property since it did not deem the purchase to be one of a real estate interest.<sup>562</sup> It distinguished cases involving the purchase of oil and gas interests which, while constituting securities, are also considered to be interests in real property and thus "goods" under the Texas act.<sup>563</sup>

Treatment of franchises under the Act has involved analysis similar to that in the *Quinn-L Equities* case. Regardless of whether tangible "goods" have been transferred, if related "services" supplied represent a significant element of the transaction, the consumer protection law applies. Thus, in *Texas Cookie Co. v. Hendricks & Peralta*,<sup>564</sup> the appeals court found that the company provided training program, operating manual, and other supervisory services clearly constituted an objective of the purchase of the franchise rights, and found that the transaction fell within the ambit of the Act.<sup>565</sup>

In cases specifically involving the acquisition of services, the courts have likewise looked at the plain meaning of the definition of "services." In evaluating a claim of attorney malpractice under the Act, the *DeBakey v. Staggs*<sup>566</sup> appeals court found it clear that an attorney sells legal services and the client purchases them.<sup>567</sup> Absent express exemption elsewhere in the act, the appeals court concluded that the legislature intended to include coverage of these professional services.<sup>568</sup> Asked to consider a claim against a non-profit abortion coun-

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562. *Id.*

563. *Id. See, e.g., In re Gas Reclamation, Inc. Securities Litigation*, 659 F. Supp. 493 (S.D.N.Y. 1987) (defining gas reclamation units as "goods" within the meaning of the Texas Deceptive Practices Act).

564. 747 S.W.2d 873 (Tex. Ct. App. 1988); *accord Wheeler v. Box*, 671 S.W.2d 75 (Tex. Ct. App. 1984).

565. *Id.* at 877 (sale of word processing franchise, including related operations manual, training program, advertising materials and supplies). This result represents a departure from the treatment of franchises under the pre-1977 version of the act, whereby a franchise was deemed an "intangible commercial contract right," not a "good" (tangible chattel) or a "service" (for other than commercial or business use); *see Crossland v. Canteen Corp.*, 711 F.2d 714, 721 (5th Cir. 1983).

566. 605 S.W.2d 631 (Tex. Civ. App. 1980).

567. *Id.* at 633.

568. *Id.* The court also noted that the act expressly exempted from coverage negligence claims against physicians and other health care providers, but that the legislature had considered and tabled a similar provision covering all professional services. *Id.*; *see also Lucas v. Nesbitt*, 653 S.W.2d 883, 886 (Tex. Ct. App. 1983).

selling service in *Mother & Unborn Baby Care, v. State*,<sup>569</sup> the court found the activities of the clinic subject to the provisions of the Act.<sup>570</sup> Neither the absence of a "sale" of goods or services, nor the non-profit status of the clinic, vitiated coverage of a transaction wherein these women sought to purchase abortion services.<sup>571</sup>

As noted earlier, the Texas legislature has given some clear indications that the Consumer Protection Act is generally intended to provide remedies cumulative to those available under more specific legislation.<sup>572</sup> The courts have followed this direction. The appeals court in *Dairyland County Mutual Insurance v. Harrison*<sup>573</sup> found that insurance policies qualify as "services purchased for lease or use," and that intended coverage of such policies was made clear by the act's provision for maintenance of an action by one adversely affected by actions or practices in violation of Article 21.21 of the Texas Insurance Code, which by terms of its coverage would require that one complaining had sought or acquired an insurance policy.<sup>574</sup>

In the context of an action by customers against a broker for failure to follow instructions, the appeals court in *Natgrass v. Rosenthal & Co.*<sup>575</sup> had to address the issue of preemption under the Commodity Exchange Act.<sup>576</sup> The court rejected the contention that the Commodity Futures Trading Commission, with its exclusive jurisdiction over the regulation of com-

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569. 749 S.W.2d 533 (Tex. Ct. App. 1988).

570. *Id.* at 540. The "abortion clinic," operating under the name of Problem Pregnancy Center, allegedly operated by enticing women seeking abortions into the clinic by inferring that such services were available and then counselled them against proceeding with an abortion. *Id.* at 536.

571. *Id.* at 538-40. The court found that the exchange of money or transfer of valuable consideration for services was not a necessary element for the Act's coverage. *Id.* at 538. The court also refused to apply an exemption for non-profit charitable organizations and political organizations recognized under FTC Act jurisprudence since the Texas act differed from the federal act in that only the latter has such a specific exemption section. *Id.* at 539. Also rejected was an argument by the clinic that they qualified for exemption under the Act as disseminators of goods and services for third parties. *Id.* at 538-39.

572. See *supra* notes 529-30 and accompanying text.

573. 578 S.W.2d 186 (1979)

574. *Id.* at 190; accord *Philadelphia Mfrs. Mut. Ins. Co. v. Gulf Forge Co.*, 555 F. Supp. 519 (S.D. Tex. 1982).

575. 641 S.W.2d 675 (Tex. Civ. App. 1982).

576. 7 U.S.C. § 1-24 (1980).

modity transaction, deprived state courts of jurisdiction over private causes of action based on state law claims regarding broker misconduct.<sup>577</sup> Noting particularly a recent U.S. Supreme Court holding that private causes of action available to private investors under the pre-1974 version of the Commodity Exchange Act survived in the amendment creating the Commission, the court deemed the Texas act concurrently applicable to these investors' claims.<sup>578</sup> A different outcome resulted in *Allais v. Donaldson, Luffkin & Jenrette*<sup>579</sup> from an attempt to bring a consumer protection claim based on alleged misrepresentations made by a stockbroker in connection with a sale of securities. There, the federal district court noted that the strict liability for misrepresentations available under the consumer protection law was too inconsistent with defenses available under the more specific state Blue Sky Law.<sup>580</sup>

In the context of damages, the *Kish v. Van Note* court made clear that cumulative recovery under the Act means that remedies available thereunder are in addition to, rather than exclusive of, other remedies. Thus, plaintiffs may recover a statutory penalty for violations of the Texas Consumer Credit Code<sup>581</sup> in addition to recovery of treble damages under the more general consumer protection legislation.<sup>582</sup>

In an unrelated issue regarding damages under the Texas act, the Fifth Circuit upheld an award of damages for mental anguish in the case of *Pope v. Rollins Protective Services Co.*<sup>583</sup> Plaintiff, lessee of a burglar alarm system, sought to recover from lessor-installer for physical injury and mental anguish suffered during a burglary when the alarm system malfunctioned. The court found that the plaintiff sufficiently demonstrated misrepresentations concerning the system's function were a producing cause of her injuries and that the mental anguish claims were sufficiently linked to concrete physical injuries to meet common law requirements for recovery of

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577. 641 S.W.2d at 678-80 (Tex. Civ. App. 1982).

578. *Id.* at 680.

579. 532 F. Supp. 749 (S.D. Tex. 1982).

580. *Id.* at 752.

581. TEX. REV. CIV. STAT. ANN., art. 5069 (West 1987 & Supp. 1992).

582. 692 S.W.2d 463, 467 (Tex. 1985).

583. 703 F.2d 197 (5th Cir. 1983).

such damages, thereby giving rise to recovery under the Consumer Protection Act.<sup>584</sup>

The Texas law provides another example of a consumer protection statute that has been consistently and extensively expanded by its legislature. By its very terms, the law applies broadly to most business transactions. The legislature's offer of some protections for defendants has been in the form of added defenses and recovery limitations rather than any narrowing of the reach of the law. Within that framework, the courts interpreting and applying the law have followed the plain meaning of the terms and definitions according to common usage, and consistently with interpretations of the same or similar language under similar state laws. The Texas legislature has given very specific indication of its intent that the Act be applied coextensively with other legislation, and the courts have also been true to that directive. The main impetus for application of this statute to "fringe" cases cannot be attributed to the courts.

#### IV. CONCLUSION

The analysis of the statutes and case law of the seven states most active in applying consumer protection law to fringe cases refutes the allegations by business interests that courts are abusing their authority by interpreting these statutes more broadly than envisioned by the legislatures. Rather, the evidence supports the proposition that the courts in fact are applying these laws in the ways intended by the legislatures. Indeed, the analysis of these seven states indicates that the legislatures intended that the statutes have a broad scope, and that the courts should have great flexibility in interpreting and applying the statutes in order to immediately address new and creative forms of unfair and deceptive practices.<sup>585</sup> Statutes of this type routinely contain general catch-all provisions prohibiting unfair and deceptive acts and practices, leaving it to the courts' discretion to define the meaning of "unfair and

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584. *Id.* at 202-05, *see also id.* at 205 n.7.

585. *See* Johnathan Sheldon, *Unfair and Deceptive Acts and Practices* (National Consumer Law Center); *see also* the discussion regarding the Connecticut statute *supra* text accompanying note 141.

deceptive."<sup>586</sup> In effect, then, the legislatures have given the courts a mandate to create a common law of unfair trade practices. The interplay between legislative and judicial developments provides further evidence that the legislatures intended the statutes to have a broad scope. Repeatedly, when courts gave the statutes a narrow construction, the legislatures responded by broadening the scope of coverage.<sup>587</sup> Thus, the evidence simply does not support the businesses' assertion that the courts have exceeded their authority in interpreting these statutes broadly.

Moreover, the trends in the seven activist states, from both the legislative and judicial branches, support the proposition that the direction taken by these states is entirely consistent with the pattern of government regulation of business that was established during the Progressive Era, the second stage in the development of the government-business relationship. The non-statist view of government regulation, championed by Taft and Wilson, involved the government only indirectly in regulating business activities. The government's role would be limited to establishing basic standards that businesses would be expected to follow, and to providing private remedies that aggrieved individuals could pursue on their own through the court system. The government, however, would not be involved in providing prior approval or prior direction to business decisions. The government's role would be reactive, rather than proactive, thereby theoretically preserving as much freedom as possible for private business decision making. The unfair trade practices legislation is entirely consistent with this approach to government regulation. The statutes provide basic guidelines that businesses are expected to follow. However, the thrust of the enforcement efforts depends on private actions, rather than on close government supervision.

The trend as reflected in the developments in these seven activist states also is consistent with the third stage in the development of the government-business relationship, wherein the government was seen as playing a major role in supporting

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586. See, e.g., the Pennsylvania statutes, *supra* text accompanying note 428.

587. See, e.g., Connecticut, *supra* notes 145-47 and accompanying text; Massachusetts, *supra* notes 246-51 and accompanying text; New Jersey, *supra* notes 316-18 and accompanying text; North Carolina, *supra* notes 375-82 and accompanying text; and Texas, *supra* notes 528-30 and accompanying text.

the consumer-oriented society. Consumers now came to be viewed as important factors in the economy, and thus the 1938 amendment to the FTC Act extended to consumers the same protection from methods of unfair competition that businesses received from the 1914 Act. At the same time, however, the non-statist philosophy adopted during the Progressive period was maintained through the private remedies approach of the state statutes.

Obviously, the activist states' approach to unfair trade practices statutes is consistent with the fourth stage in the government-business relationship wherein regulation became more concerned with quality-of-life issues. This is the stage that spawned the consumer protection movement on the state level. Significantly, however, even though government regulation has greatly increased during this period, the thrust of most of the regulatory legislation has maintained the non-statist philosophy of establishing broad guidelines for businesses to voluntarily follow, with the basic penalties for noncompliance being private remedial actions by individual aggrieved consumers.

State unfair trade practices statutes, then, with respect both to the legislative intent in adopting the statutes and to the courts' application of the statutes, have been consistent with the trend of government regulation in modern United States history. These statutes attempt to safeguard the workings of the market system by making sufficient information available to the consumer in order to make rational economic choices. At the same time, these statutes attempt to minimize direct government regulation of business conduct by adopting the non-statist approach to regulation. Whether these statutes accomplish their goal, that of promoting a more efficient economic system with minimal government interference, is debatable and beyond the scope of this paper.<sup>588</sup> What is clear,

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588. One commentator has argued that the common law approach to regulation, which is the basic approach utilized in the state unfair trade practices statutes, is far superior to administrative regulation. See Peter H. Aranson, *Theories of Economic Regulation: From Clarity to Confusion*, 6 J.L. & POL. 247, 267 (1991). Another commentator has argued that private litigation, which again is the approach adopted by the state unfair trade practices acts, is in many instances a far superior mechanism for controlling deceptive advertising than either administrative regulation or industry self-regulation. Private litigation is superior because "[i]t is faster than actions by the FTC or other governmental units; its substantive outcomes reflect public concerns; its remedies have the force of law; and it will ordinarily



however, is that the courts have not engaged in judicial activism in order to broaden the coverage of the statutes. The courts have simply carried out the will of the legislative bodies that created the statutes.

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be brought into action only against ads whose falsebonds have been effective in the marketplace." Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GEORGIA L. REV. 1, 4 (1985).